SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 344

HUBERT WORK, AS SECRETARY OF THE INTERIOR, PETITIONER

vs.

ROBERT L. BRAFFET, ADMINISTRATOR OF THE ESTATE OF MARK P. BRAFFET, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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1 [Caption omitted.]

In Supreme Court of the Distruct of Columbia

In equity. No. 42382

MARK P. BRAFFET, PLAINTIFF

vs.

HUBERT WORK, AS SECRETARY OF THE INTERIOR, DEFENDANT

Amended bill of complaint

Filed June 12, 1924

To the Supreme Court of the District of Columbia:

Comes now the above-named plaintiff, and for this amended bill of complaint, consent of the court first being had, complains herein against the defendant as follows:

I

That said plaintiff is a citizen of the United States and a citizen of and resident in the State of Utah; that at all times herein mentioned he was upwards of twenty-one years of age and was and still is qualified in all repects to purchase known coal lands of the United States, pursuant to law in relation thereto; that he brings this suit in his own right and not otherwise.

II

That the above-named defendant is the duly appointed, qualified, and acting Secretary of the Interior, and temporarily a resident in the District of Columbia, and is sued herein in his representative capacity and not otherwise.

III

That at the United States land office at the city of Salt Lake, in the State of Utah, and on February 4, 1918, this plaintiff filed
2 in said land office his application under the provisions of section 2347, U. S. Revised Statutes, to purchase the following-described known coal lands, and known as such on the date of the admission of the State of Utah, which were a part of the public lands of the United States and then subject to purchase by this plaintiff, and not otherwise appropriated or reserved under the laws of the United States, situate in the State of Utah and county of Carbon, and more particularly described as follows, namely: SE ¼ of sec. 32, township 12 S., range 10 E., S. L. M., and thereupon and at the

same time paid to the register and receiver thereof the fees required by law therefor and received thereupon their receipt therefor; that said application is serial No. 022470, and subsequently there was endorsed thereon, pursuant to the order and direction of the Department of the Interior, the following directions and words, namely: "Suspended pending disposition of contest 3655."

IV

That thereupon the said register and receiver, and on the 25th day of July, 1918, directed a notice of publication of said application, and thereupon a publication thereof was had in a newspaper as directed, published in the vicinity of said lands, and which, amongst other things, directed all persons to file any and all objections they may have had to the said application on or before the expiration of thirty days from the 25th day of July, 1918, and thereon notice of said application was given to the State of Utah.

V

That on the 13th day of August, 1918, the State of Utah intervened in said application, proceeding on the ground that the title to said lands had passed to said State by reason of the school-land grant to said State contained in the Utah enabling act of date of January 4, 1896; and about the same time the Pleasant Valley Coal Company, a corporation created and existing pursuant to the laws of Utah, and whose major stock was then owned by the Utah Fuel Company, a corporation created and existing pursuant to the laws of New Jersey, and whose major stock was then owned by the Denver and Rio Grande Railroad Company, a railroad corporation, also intervened in said application on the ground that it claimed title in fee under and through a patent from said State of Utah for said lands, and that said lands were agricultural only in character and claimed by the said State of Utah under its enabling act.

VI

That on or about the 25th day of July, 1918, the said register and receiver approved said application and subsequently directed said plaintiff to complete his purchase by payment within fifteen days thereafter at the price designated in the classifiecation price thereof; but before the expiration of said period, by order of the Department of the Interior therein, said payment therein was suspended and deferred until the determination of the contest by said department, all of which more fully appears hereinafter.

3 VII

That in said proceedings it was determined that said lands were known coal lands at the date of the admission of Utah into the Union of the States, on and prior to January 4, 1896.

VIII

That on the 18th day of February, 1920, after a hearing in the local land office arising under said contest by the State of Utah and said Pleasant Valley Coal Company, the application of plaintiff was dismissed, and thereupon plaintiff appealed therefrom, and within thirty days thereafter, to the Commissioner of the General Land Office, and in the proceeding therein on appeal the action of said local land office was wholly reversed and direction made therein that plaintiff be allowed to complete his purchase of said known coal lands.

IX

That thereupon the said contestants appealed from said order to the Secretary of the Interior, and in proceedings had therein and on the 31st day of July, 1922, an order was made remanding said proceeding to said local office to permit said State of Utah to offer additional proofs therein and directing the Government to formally intervene therein.

X

That thereafter and without notice to the plaintiff, and without his knowledge, privity, or consent, the said State of Utah filed with the said register and receiver in said local land office and in said appeal proceeding its abandonment of said contest and of any claim on its part of any title in or to said lands, and admitting said lands were known coal lands at the date of the admission of Utah into the Union of States; and thereupon the Pleasant Valley Coal Company did likewise; and thereupon and without notice to plaintiff, and without his knowledge, privity, or consent, and on the 8th day of January, 1924, and on representations and statements made to the Secretary of the Interior by the officers, agents, and attorneys of said State of Utah and Pleasant Valley Coal Company, and of which plaintiff had no knowledge or notice, and wholly without notice to or knowledge, privity, or consent of plaintiff, the Secretary of the Interior closed said proceedings without notice to plaintiff before or since.

XI

That all of said section 32 was excepted from the school land grant to Utah, the same being known coal lands at the date of the grant, and Utah had no right, title, or interest, or presumptive title therein or to any part thereof, and no legal, equitable, or presumptive title passed to Utah thereby or thereunder to said section 32 or to any part thereof; but the same remained a part of the public domain of the United States and subject to mineral entry and to purchase under the coal laws of the United States by plaintiff and said applicants.

4

XII

That heretofore and after learning for the first time of the closing of the said proceeding, as aforesaid, and on the 15th day of March, 1924, plaintiff made application to the Department of the Interior to reopen said proceedings, but on the 24th day of March, 1924, said application was denied, and plaintiff has fully exhausted the procedure of said Department of the Interior in the establishment of his rights and claim and has no further remedy or procedure therein and has no adequate remedy at law.

XIII

That heretofore and on the 4th day of February, 1918, one Agnus J. Mullings made similar application to purchase S. ½ NW. ¼, E. ½ SW. ¼, sec. 32, township 12 S., range 10 E., S. L. M.; as did also one Robert J. Turner to purchase NE. ¼ id.; and as did also one John H. Woodmansee to purchase N. ½ NW. ¼ id.; and on the 9th day of October, 1919, one Robert W. Hopkins made application to purchase W. ½ SW. ¼ id. in the same manner as did the plaintiff, as aforesaid; and similar publications, proceedings, and contests following said respective applications by the same said parties, the State of Utah and Pleasant Valley Coal Company, it was agreed and stipulated by the said parties, and which stipulation was agreed to by the Department of the Interior, that the disposition of the same should abide the final disposition of the said proceeding of the plaintiff.

Therefore plaintiff prays, amongst other things, that similar action be had herein based on said stipulations, so that a multiplicity of suits concerning the same subject matter may be avoided, or that they be included as defendants herein, in that their several rights under their several applications to purchase the said designated lands be determined and adjudicated in this suit, or that they be severally permitted to intervene herein, for adjudication and determination of their respective rights arising under their said respective applications to purchase as aforesaid; and it is further alleged applicants were severally qualified in every respect to make and perfect their said respective applications; that said respective applicants have no adequate remedy at law.

XIV

That at the time of said application of plaintiff the said lands had been divided into legal subdivisions under an approved survey by the United States and had been classified by the United States as known coal land.

XV

That at the time of plaintiff's said application and ever since the plaintiff was and now is ready, able, and willing to complete his said

purchase and to pay the classified price thereof, which is the reasonable value thereof.

5

XVI

That subsequent to the closing of said contest and dismissal of said proceeding, as aforesaid, plaintiff basing his application on the said proceedings of the State of Utah, the Pleasant Valley Coal Company, in withdrawing from said contest proceeding, and the Secretary defendant, as aforesaid, and setting forth the same in extenso, moved to reopen his said proceeding, but said Secretary defendant denied said application, and plaintiff is now without remedy therein, having fully exhausted the procedure, rules, and regulations of the Department of the Interior in such instance and in the establishment and maintenance of his rights therein.

Wherefore plaintiff prays that a writ of subpœna issue directed to said Secretary defendant, requiring him to appear herein and answer the exigencies of this bill of complaint; that a mandatory injunction issue against the defendant Secretary, directing that the decision of the Department of the Interior of July 31, 1922, be vacated, and that the prior said decision of the Commissioner of the General Land Office be affirmed in all respects, and that it be further adjudicated and decreed that the said application of plaintiff was valid, and that he be permitted by the defendant Secretary to complete his purchase of said lands in the manner provided by law, and thereupon that a patent shall issue to plaintiff therefor.

That plaintiff may have such other and further relief as may be just and equitable.

HENRY R. HARRIMAN,
EDMUND BURKE,
Attorneys for Plaintiff.

[Duly sworn to by Edmund Burke; jurat omitted in printing.]

In Supreme Court of District of Columbia

Stipulation as to action in cases Nos. 42421, 42422, 42423, and 42424

Filed April 25, 1924

* * * * * * *

It is hereby stipulated by and between the attorneys for the above-named parties that the above-entitled actions abide the determination by this court of the issues in the suit in equity, No. 42382,

6 wherein Mark P. Braffet is plaintiff and Hubert Work, as Secretary of the Interior, is defendant.

Dated April 7, 1924.

EDMUND BURKE,
HENRY R. HARRIMAN,
Attorneys for Plaintiffs.
C. EDWARD WRIGHT,
Attorney for Defendant.

In Supreme Court of District of Columbia

Answer

Filed June 9, 1924

* * * * * * *

The defendant, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies of the plaintiff's bill of complaint in the above-entitled suit, and especially saving and reserving all benefit and advantage from those matters hereinafter set forth as grounds for the dismissal of said bill, for answer to said bill or so much thereof as he is advised is material, says:

1. He admits the averments of paragraph 1.

2. He admits the averments of paragraph 2.

3. He admits that on February 4, 1918, at the United States land office at Salt Lake City, Utah, plaintiff filed application under Revised Statutes, section 2347, to purchase the SE. ¼ of sec. 32, T. 12, S., R. 10 E., S. L. M., as coal land of the United States, that he paid a filing fee of $10 therefor, that said application was given serial number 022470, and that subsequently the application was indorsed as averred in said paragraph; but he further says that by act of Congress approved July 16, 1894, sec. 32 of every township in the State of Utah was granted to said State for school purposes; that the aforesaid section had been officially surveyed prior to the admission of Utah into the Union and was returned as nonmineral in character; that on July 3, 1907, the General Land Office classified said land, as of that date, as coal land, which classification was in force at the time of plaintiff's said application; that at the date of filing said application, however, it had never been determined that the land was of known mineral character at the date when the said school-land grant to the State of Utah attached; that said State claimed that it took title to each granted school section whether the same was mineral or nonmineral; that for some years prior to plaintiff's application the validity of said claim, to wit, that the State took title to granted sections regardless of mineral character, had been in litigation (United States v. Sweet, 245 U. S. 563), the ultimate decision of the Supreme Court being that it did not so take title to land known to be mineral at the time when the State's rights otherwise would have attached; that pending said litigation, and on November 10, 1915, the Secretary of the Interior had suspended the functions of local land officers, including the land officers of the said Salt Lake City land office, affecting coal-land applications for lands included in school sections, and had directed said officers to receive and

7 transmit all applications to enter, based on alleged mineral character of land, to the General Land Office until further directed; that said instructions were in full force and effect on February 4, 1918, and until June 13, 1918, and that during said period

said officers had no authority to take any action on any such application other than simply to receive and transmit the same to the General Land Office; that the State of Utah long prior to the filing of said application by the plaintiff claimed the land in controversy under its school-land grant and had actually sold said land in 1902 to a party, the grantor of the Pleasant Valley Coal Company, hereinafter mentioned, all of which was then and there well known to the plaintiff; that the defendant is informed and believes and therefore avers that in the year 1902 plaintiff was the attorney for the said Pleasant Valley Coal Company and so continued to be until the year 1917, much of said period being either general attorney or general solicitor of said company and occupying offices with said company; that during said relation of attorney and client plaintiff well knew of the asserted claim of title to said land by said company and of its deraignment from the said State of Utah; that the land, at the time of filing said application, was not vacant coal land of the United States not otherwise appropriated or reserved by competent authority and was not subject to entry under the provisions of Revised Statutes, section 2347; that the land having been returned as nonmineral in character, title had presumably passed to the State of Utah upon its admission as a State and was in the State unless and until, after proper proceeding and due process of law, it had been found and determined that the land was actually known to be mineral in character at the time when the State's title, if at all, attached; that the filing by plaintiff of his said application to purchase said land constituted in effect but an application to contest the presumed title of said State, and it was so treated; and that the said application was not subject to acceptance and allowance unless and until it should be determined, as aforesaid, that said land was in fact known to be mineral in character at the date of the admission of Utah into the Union.

4. Answering the averments of paragraph 4, he admits the same and alleges that the said notice was published in the Helper Times, a newspaper of general circulation published near said land, for five consecutive weeks, beginning August 2 and ending August 30, 1918, a like notice being posted in the said Salt Lake City land office.

5. Answering the averments of paragraph 5, he says that on or about August 13, 1918, the State of Utah, claiming title to said land as aforesaid, filed a protest against the allowance of plaintiff's said application and that the Pleasant Valley Coal Company at or about that time joined in the protest, asserting title through or under the State; but as to the ownership of the stock of said company, if the same be material, he is advised and believes, and therefore avers, that at that time the stock of the Utah Fuel Company, owner of all but 20 shares of the stock of the said Pleasant Valley Coal Company, was owned by William Salomon and Company of New York.

6. Answering the averments of paragraph 6, he states the facts to be as follows: That on June 13, 1918, the order of November

8 10, 1915, referred to in paragraph 3 of this answer, was rescinded and thereupon, and on July 25, 1918, the local land officers allowed the application of the plaintiff as an application and directed the issue of notice hereinbefore mentioned; that the record in the case fails to substantiate all other averments in paragraph 6 of the bill of complaint and the defendant is without any information whether the same be true; but he avers that on March 6, 1903, a circular of instructions approved by the Secretary of the Interior issued out of the General Land Office, which circular was in full force and effect at the date of filing of plaintiff's application as well as at the date of issue of notice thereon, as aforesaid, which circular in terms provided:

"When a school section is identified by the Government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as contest cases;"

and that by decision of the said Secretary in the case of State of Utah (32 L. D. 117, 118), dated May 5, 1903, it was held that coal land filings covering lands within school sections—

"should not have been allowed in the absence of a determination (upon notice to all parties interested, as in other contest cases), that the lands were known to be chiefly valuable for coal deposits at the date the State was admitted into the Union."

He avers that if the allegations of paragraph 6 of the bill be true the local officers acted without authority and contrary to the regulations of the department and that such acts were void and of no effect; but he further avers the real intendment and effect of what was in fact done by said local officers was to allow plaintiff's application as the initiation of a contest proceeding against the State, and as a matter of fact he alleges it was so treated and ultimately disposed of as an application to contest.

7. He denies the averment of paragraph 7, if thereby the plaintiff means the proceedings before the local land office, and states the fact to be that said local land officers, after due hearing in the contest proceeding between the plaintiff on the one hand and the State of Utah and the Pleasant Valley Coal Company on the other hand, decided that said land was not known to be coal land at the date of admission of Utah into the Union.

8. Answering the averments of paragraph 8, he states the facts to be that at the hearing before the local land officers plaintiff took the burden of proof that the land was known to be mineral land at the time when otherwise the State's title would have attached and introduced evidence supporting his case; that at the conclusion thereof the State of Utah and the Pleasant Valley Coal Company, intervener, filed a motion to dismiss in the nature of a demurrer to the

evidence, which motion was sustained by the local land officers without hearing any testimony introduced in behalf of the State's claim; that thereupon plaintiff appealed from the decision and judgment of said local land office to the Commissioner of the General Land
9 Office; that thereupon, and on February 28, 1921, the Commissioner of the General Land Office rendered his judgment and opinion, reversing said local land officers, and in said judgment did order, and not otherwise, that:

"The protest of the State is hereby held for dismissal, subject to the right of appeal within 30 days from notice to the Secretary of the Interior."

9. He admits the allegations of paragraph 9 and states that the decision of the Secretary therein referred to is entitled State of Utah, Pleasant Valley Coal Company, intervener, v. Braffett, and is reported in 49 Land Decisions at p. 212; judicial notice thereof being respectfully requested for a further and more detailed account of the proceeding therein duly had in the Interior Department, the same as if in detail specifically plead in this answer; and in further answer to said paragraph 9 the defendant avers that in and by said decision it was ruled that the Commissioner of the General Land Office erred in his order set forth in paragraph 8 of the answer, in that he should have reversed the local land officers only to the extent of remanding the case with directions to overrule the motion to dismiss with leave to the State and the intervener to proceed with their case and to introduce evidence if so advised, as provided in the rules of practice of the Land Department; and that further it was held that the plaintiff's application was nothing more, in law, that an application to contest the right of the State to the land, that no preference right to enter the land could accrue to the plaintiff under his contest even if successful, that in the meantime the general leasing act of February 25, 1920 (41 Stat. 437), had become the law, which said act repealed all previous laws authorizing the sale of coal land except as to claims within the saving clause of section 37 of said act, and that plaintiff's application was not a valid claim within the meaning of said saving clause. Whereupon the defendant in said opinion and judgment of July 31, 1922, formally rejected plaintiff's coal application and remanded the case to the local land office for the submission of further evidence, and directed the formal intervention of the Government, to be represented by an officer of the field service of the General Land Office, and provided for the further prosecution of the contest by the Government in the event that plaintiff did not proceed as a contestant.

10. He denies the allegations in paragraph 10 of the bill, save such as are hereinafter stated, and says that the facts are as follows: That subsequent to the rendition of the decision of the Secretary on July 31, 1922, as aforesaid, both the plaintiff and the Pleasant Valley Coal Company filed motions for rehearing, which in due course were denied on October 31, 1922; that the plaintiff then filed

a petition for the exercise of supervisory authority, which was denied by the defendant on December 28, 1922; and that on said last-mentioned date, the State of Utah, through its attorney general, executed a withdrawal, and prayed a dismissal, of its protest, but without prejudice to the interests or rights of the intervener, the said Pleasant Valley Coal Company, for the reason, as therein set forth, that it had no beneficial interest in the land in controversy because on or about May 14, 1902, it had parted with its title by issuing its patent therefor to one Laura Bird. And he further alleges that on or about August 3, 1921, the United States had issued its lease to the Pleasant Valley Coal Company, under the leasing act of February 25, 1920, aforesaid, for certain other lands situate near sec. 32, T. 12 S., R. 10 E., containing 1,560 acres; that on March 2, 1923, said company filed with the defendant an application for the modification of said lease so as to include therein all of said sec. 32 (whereof the land in controversy is the SE. ¼); that in said application said company set forth that the State of Utah had offered said land at public sale in 1902, that it was purchased by and patented to said Laura Bird, and that the said Bird had deeded the title so acquired to the said company, which since 1902 had been the record owner of said land in good faith and had since said date paid all real-estate taxes levied upon said land; that by decisions of July 31, 1922, October 31, 1922, and December 28, 1922, the department had finally rejected the application of the plaintiff for the land, but had remanded the case for further hearing to determine the known character of said land on the date of admission of the State of Utah into the Union, and in said decisions had laid a rule of evidence, to wit, that the mineral character of the land might be established solely by testimony of the value of neighboring land and by showing as a matter of probability and inference the extension into this land of coal beds known to exist in the vicinity; that rather than to proceed to a further hearing, with the incidental delay and expense, and with the possibility of ultimate litigation in the courts for the protection of its asserted rights as the mesne grantee of the State, and to obviate further controversy with the United States as to the validity of its title, it offered to waive its claim to the legal title and to take a leasehold tenure therein conditioned upon the inclusion of said land in its coal-land lease, aforesaid, expressly stipulating, however, that until the granting of such modified lease it retained its asserted legal right to the possession of the land as the mesne grantee of the State of Utah with all power reserved to maintain its title before the Land Department or any other tribunal; that thereupon, as by section 2 of the act of February 25, 1920, the Secretary was authorized, among other things, to consider and recognize in awarding coal-land leases equitable rights of persons who claim such lands in good faith, and inasmuch as on the record the Pleasant Valley Coal Company was found to be a claimant

in good faith, and inasmuch as the modification of said lease would be to the interest of the United States, the Commissioner of the General Land Office, acting under the authority of the defendant, on April 2, 1923, notified the register and receiver of the local land office at Salt Lake City that the Secretary had entertained said application to include the land in controversy in said lease and directed the usual publication of notice required by section 12 of the coal-leasing regulations; that thereafter such notice was given, calling upon all persons having adverse or conflicting claims to the land or any part thereof to file a protest or objection on or before May 25, 1923, else any such protest or objection against the granting of the lease would be disregarded; that said notice was posted in the Salt Lake City land office and was published in
11 the Helper Times, a newspaper of general circulation, for a period of five successive weeks beginning April 13, 1923; and that no protest or objection was filed by plaintiff or by anyone against the granting of said lease; that he admits that so far as he knows plaintiff did not consent to this action, but whether he had actual notice thereof he is without information other than as appears in plaintiff's averment in said paragraph 10. Further answering, he avers that on June 4, 1923, said lease of August 3, 1921, was modified by the inclusion of said section 32 therein, and the lease so modified was on that date approved by the defendant; that said lease is now in full force and effect; that under and by virtue of its ownership said Pleasant Valley Coal Company, lessee, is the owner of a leasehold estate in and to the lands described in said bill of complaint with the right to remove coal from said leased premises under certain covenants and conditions, including payments of an annual cash rental to the United States and a royalty of a certain sum per ton of coal mined therefrom, and under the obligation of mining a certain minimum tonnage per annum and of expending a prescribed sum in opening and developing said leased premises.

11. Answering the averments of paragraph 11, he states that whether or not said sec. 32 was excepted from the school-land grant to the State of Utah depends entirely upon the fact of its known character at the date when the grant became effective; that if the land was then known to be mineral in character title did not pass to the State; that if the land was not then known to be mineral in character full legal title did pass to the State, inasmuch as the law does not require issue of patent to the State of Utah or any other act or deed on the part of the Secretary to pass such title; and he alleges that, as hereinbefore shown by this answer, the question as to the known character of said land has never been determined finally by the Land Department for reasons hereinbefore appearing. But he is advised, and believes, and therefore avers that whether as a fact the land was known to be mineral at the time when otherwise the State's title would have attached presents an issue immaterial in plaintiff's suit for the reason that prior to Janu-

ary 4, 1896, the date of admission of Utah into statehood, the land had been duly identified by public survey and had been returned as nonmineral in character and that prima facie a good title then and there vested in the State; that the land thereafter was not appropriable public land of the United States unless and until on proceedings duly had, to which the State of Utah or any privy in interest was a party, it was found, determined, and adjudged by the Land Department that the land was known mineral land on the date last above written; that until such an adjudication said land was not vacant coal land of the United States not otherwise appropriated or reserved by competent authority, but was land in the status where title thereto could not be disposed of by the Land Department as public land of the United States, nor could any person acquire any vested right or interest therein by any entry or application to enter under the public-land laws of the United States.

12. He admits that on or about March 14, 1924, the plaintiff filed a petition for the reopening of said proceedings, that the same was denied on March 24, 1924, and that plaintiff had fully ex-
12 hausted the procedure of the Interior Department in the establishment of his claim; but as to other allegations of fact in said paragraph he has no knowledge, and as to whether plaintiff has no adequate remedy at law he is advised that this allegation presents a conclusion of law which he need not answer.

13. He admits the allegations of paragraph 13, but avers that since the filing of plaintiff's bill herein the said Mullings, Woodmansee, Hopkins, and Turner have severally filed their similar bills of complaint in this court, and that the same are now pending under a stipulation to abide the outcome of this suit.

14. He admits the allegations of paragraph 14.

15. Answering the averments of paragraph 15, he states that he is without information concerning the same.

16. He admits the averments of fact in paragraph 16.

And now for further answer to said bill and for cause wherefore the said bill should be dismissed in part by reason of defects apparent on the face of the bill itself, he says:

(a) The Pleasant Valley Coal Company, lessee, as aforesaid and as by plaintiff's bill appears, is an indispensable party to this suit, in whose absence it should not proceed.

(b) That if by the averments of his bill it is meant that the lease to said company is for any reason invalid, and for such reason is not a bar to the relief sought by the plaintiff, the validity of said lease is not subject to collateral attack by the plaintiff herein in a suit to which said lessee is not a party, or to attack in any suit save a direct suit by the United States to annul or vacate said lease for good and sufficient cause.

(c) That by reason of plaintiff's failure to take any action by way of protest or objection to the inclusion of said land in said lease to the Pleasant Valley Coal Company, after due notice so to do, he

is barred by his conduct from any relief such as is sought in this bill.

(d) That the suit in effect is one against the United States, which has not consented to be sued in this behalf.

(e) That aside from the objection to the maintenance of the bill for lack of indispensable parties the bill exhibits no facts which entitle the plaintiff to the relief sought or to any relief in equity.

(f) That by reason of the facts set forth in the pleadings it is apparent that the land sought to be purchased by the plaintiff was not at the time of his application therfor or since vacant coal land of the United States not otherwise appropriated, subject to purchase under the provisions of Revised Statutes, section 2347, but on the contrary was land in good faith and under color of title claimed in ownership by the Pleasant Valley Coal Company as mesne grantee of the State of Utah, claiming under its school-land grant, as plaintiff then and there well knew.

(g) And that this suit is brought for the purpose of compelling defendant to perform an illegal act, to wit, to effect the sale to plaintiff and to issue to him patent for public land not subject to sale but withdrawn from sale by the terms of the act of February 25, 1920, subject only to lease for the production of the mineral therein with royalty and rental reserved to the United States.

13 Wherefore he prays that the bill of complaint may be dismissed, that he may have judgment as at law for his reasonable costs, and that he may be permitted to depart hence without day.

HUBERT WORK,
Secretary of the Interior.
By his attorney: C. EDWARD WRIGHT,
Attorney for the Interior Department.

[Duly sworn to by C. Edward Wright; jurat omitted in printing.]

In Supreme Court of District of Columbia

Notice of motion to strike

Filed June 16, 1924

* * * * * * *

To C. EDWARD WRIGHT, Esq.,
Attorney for Defendant.

Please take notice that on the 20th day of June, 1924, at 10 a. m. in equity division No. 2 of the Supreme Court of the District of Columbia, District Courthouse, in the city of Washington, the plaintiff will move to strike from the answer, on the ground that the same is redundant and immaterial, all allegations therein contained relating to the issuance of a lease by the Secretary of the Interior to the Pleasant Valley Coal Company of the premises described in the

complaint; and that on such motion the plaintiff will use the files in this suit.

HENRY R. HARRIMAN,
EDMUND BURKE,
Attorneys for Plaintiff.

JMF.

In Supreme Court of District of Columbia

Order restoring causes to calendar

Filed January 6, 1925

* * * * * * *

Whereas, and on the 20th day of June, 1924, there was submitted to the honorable Wendell P. Stafford, a justice of the supreme court sitting in equity, the above-entitled cause, together with four other equity causes pending in said court to abide event, namely, Nos. 42421, 42422, 42423, and 42424; and

14 Whereas and subsequently a præcipe was entered by the plaintiff dismissing said causes without prejudice, whereupon the clerk of this court made an order dismissing said causes without prejudice; and

Whereas the parties hereto have agreed that the said causes shall be restored to the calendar of this court for submission under the bill and answer:

Now therefore it is ordered that the clerk of this court restore said causes to the calendar.

WENDELL P. STAFFORD,
Justice, Supreme Court, D. C.

No objection:
C. EDWARD WRIGHT,
Attorney for Defendant.

JANUARY 6, 1925.

In Supreme Court of District of Columbia

Decree

Filed September 29, 1926

* * * * * * *

The above-entitled cause heretofore having been submitted for final decision and decree on the bill, answer, and stipulation of the parties, and the court after hearing argument of counsel for the respective parties, after due consideration of the issues involved, and being fully advised in the premises finds:

1. That the application of the plaintiff Braffet to purchase as coal land the tract herein involved is valid, entitles plaintiff to complete his purchase, and thereupon to receive a patent to the lands purchased.

2. That the Pleasant Valley Coal Company is not an indispensable party to this action; no right of said Pleasant Valley Coal Company to be affected by this decree.

3. That a mandatory injunction should issue from this court to the Secretary of the Interior directing him to vacate and set aside the decision of the Department of the Interior of July 31, 1922, referred to in the amended bill of complaint herein, and in all respects to affirm the prior decision of the Commissioner of the General Land Office; to further hold that Braffet's application is valid, that he is entitled thereunder to complete his purchase, and cause patent to issue in his favor upon such completed purchase. Pursuant to the foregoing findings it is hereby

Ordered, adjudged, and decreed, by the court, that the prayer of the plaintiff, Mark P. Braffet, for mandatory injunction to the Secretary of the Interior be and the same is hereby granted and the clerk of this court will issue the same, in due course, in accordance with the findings of the court herein contained.

Dated September 29th, 1926.

O. K.:

EDMUND BURKE,
Attorney for Plaintiff.

O. H. GRAVES,
Attorney for Defendant.

15 Whereupon the defendant, by his attorney, O. H. Graves, in open court, noted an appeal from the foregoing decree to the Court of Appeals of the District of Columbia, and it is hereby on the day aforesaid,

Ordered that the appeal be allowed and that execution of said decree be and the same is hereby stayed, pending said appeal.

By the court.

WENDEL P. STAFFORD, *Justice.*

In Supreme Court of District of Columbia

Assignment of errors

Filed September 29, 1926

* * * * * * *

The appellant assigns the following as errors of the Supreme Court of the District of Columbia in rendering its decree herein, viz:

1. The court erred in rendering judgment in favor of the plaintiff, Mark P. Braffet.

2. The court erred in holding to be valid the application of Braffet to purchase as coal land the tract involved and in holding that plaintiff thereby became entitled to complete said purchase and receive a patent.

3. The court erred in holding that a mandatory injunction should issue out of said court addressed to the Secretary of the Interior, and in ordering the issuance thereof directing him to vacate and set aside his decision of July 31, 1922, to affirm in all respects the prior decision of the Commissioner of the General Land Office and requiring him to hold Braffet's application to be valid and cause a patent to issue in his favor covering said land.

4. The court erred in ordering the Secretary of the Interior to issue a patent herein.

5. The court erred in finding and holding that the Pleasant Valley Coal Company is not an indispensable party to this action.

6. The court erred in failing to hold that the United States is an indispensable party to this action.

7. The court erred in failing to hold that the amended bill of complaint herein does not set forth facts sufficient to constitute a cause of action.

8. The court erred in failing to hold that the amended bill of complaint does not set forth facts sufficient to vest a court of equity with jurisdiction to grant the relief sought.

9. The court erred in failing and refusing to dismiss the amended bill of complaint in response to defendant's motion.

10. The court erred in failing to render judgment in favor of the defendant.

O. H. GRAVES,
Attorney for Appellant.

In Supreme Court of District of Columbia

Designation of record

Filed September 29, 1926

* * * * * * *

The clerk in making up the transcript of the record of appeal will include the following pleadings therein:

16 1. The amended bill of complaint.

2. The amended answer.

3. The stipulation amending answer and making it applicable to equity Nos. 42421, 42422, 42423, and 42424.

4. Notice of motion bringing on for hearing the suggestion that the Pleasant Valley Coal Company is an indispensable party defendant.

5. Stipulation submitting cause on bill and answer after restoration to the calendar.
6. Assignment of errors.
7. This designation.

O. H. GRAVES,
Attorney for Appellant.

Service of the above designation acknowledged Sept. 29th, 1926.

EDMUND BURKE,
Attorney for Appellee.

O. K.:

EDMUND BURKE,
Atty. for Plaintiff.

[Clerk's certificate to foregoing transcript omitted in printing.]

* * * * * * *

17 In Court of Appeals of District of Columbia

HUBERT WORK, AS SECRETARY OF THE INTERIOR, APPELLANT
vs.
MARK P. BRAFFET } No. 4528

Order substituting Robert I. Braffet as party appellee

Feb. 9, 1927

The death of Mark P. Braffet, appellee in the above-entitled cause, and the appointment of Robert I. Braffet as administrator of his estate, was suggested to the court by Mr. Edmund Burke of counsel for the appellee. On consideration whereof, and upon motion and agreement of counsel in open court: It is ordered that Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased, be, and he is hereby, substituted as the party appellee in this cause in the place and stead of the said Mark P. Braffet, deceased.

18 [Minute entry of submission, Feb. 9, 1927, omitted in printing.]

19 In Court of Appeals of the District of Columbia

No. 4528

HUBERT WORK, AS SECRETARY OF THE INTERIOR, APPELLANT

v.

ROBERT I. BRAFFET, ADMINISTRATOR OF THE ESTATE OF MARK P. BRAFFET, DECEASED

Before Martin, Chief Justice; Robb and Van Orsdel, Associate Justices.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the court:

This appeal is from a mandatory injunction issued by the Supreme Court of the District of Columbia directing Hubert Work, Secretary

of the Interior, to issue a patent to the above named appellee, Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased, to certain coal lands situated in the State of Utah.

It appears that Mark P. Braffet, a citizen of the United States, on the 4th day of February, 1918, applied to the officials of the local land office at Salt Lake City, Utah, to purchase as coal land, under section 2347 R. S., the S. E. ¼ of sec. 32, Town. 12 S., R. 10, E., S. L. M.; that on the 13th day of August, 1918, the State of Utah intervened and contested the application on the ground that at the time the school land grant was made to Utah, under the enabling act of January 4, 1896, the lands in question were not known to be coal lands; and that accordingly at that time title to the said lands vested in the State of Utah.

At about the same time, the Pleasant Valley Coal Company, hereafter for convenience referred to as the Coal Company, a Utah corporation, intervened in said application on the ground that it held title in fee to said lands under a patent from the State of Utah, alleging that the lands were agricultural only in character and claimed by the State of Utah under the enabling act. The contest proceeded in the local land office and, at the conclusion of appellee's proof, the State of Utah moved to dismiss the application, which motion was granted. Appellee appealed to the Commissioner of the General Land Office, where the decision of the local land office was reversed, the commissioner sustaining the application as valid and holding that appellee was entitled to complete his purchase.

The State of Utah and the Coal Company appealed to the Secretary of the Interior, who reversed the commissioner, holding that Braffet had prima facie established that the lands were known coal lands at the time of the grant to Utah, but that his application could not be approved since the presumptive title to the lands was in the State. The Secretary held that the motion to dismiss was erroneous and remanded the case to the local land office directing that the State of Utah be permitted to produce further proof, and permitting Braffet as the "contestant" to continue as such against the claims of Utah.

It is alleged in the answer, which for the purposes of this case must be taken as true, since the case was tried on bill and answer, that subsequent to the decision of the Secretary on July 31, 1922, Braffet and the Coal Company filed motions for rehearing, which were denied. Braffet then petitioned the Secretary for the exercise of supervisory authority, which was denied on December 28, 1922. On that day the State of Utah, through its attorney general, executed a withdrawal and prayed for a dismissal of its protest, without prejudice however to the interests of the Coal Company, alleging that it had no beneficial interest in the land, since on or about May 14, 1902, it had issued a patent therefor to one Laura Bird, who subsequently conveyed the lands to the Pleasant Valley Coal Company.

It is further alleged in the answer that on or about August 3, 1921, the United States, through the Secretary of the Interior, issued a

lease to the Coal Company under the leasing act of February 25, 1920 (41 Stat. 437), for certain lands adjoining and in the vicinity of section 32; and on March 2, 1923, the Coal Company filed with the Secretary of the Interior an application for modification of its lease so as to include therein all of section 32, offering therein to waive its claim to the legal title to said land and to take a coal land lease for the same, conditioning its waiver, however, upon the granting of the modified lease. The Secretary accordingly directed the Commissioner of the General Land Office to modify the lease of the Coal Company as requested, basing his action upon section 2 of the act of February 25, 1920, authorizing him in awarding coal land leases to recognize equitable rights of persons who claim such land in good faith.

It is clear that this case must stand or fall upon the conditions existing on February 4, 1918, the date when Braffet filed his application for the purchase of the lands in question with the register of the local land office at Salt Lake City. This application was filed under the provisions of section 2347, R. S. U. S., as follows: "Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the Register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

The sole question to be determined, is whether or not at the date Braffet filed his application the lands in question were vacant coal lands of the United States. That they were vacant coal lands on that date is settled by the decision of the Secretary, and the concession of the intervening claimants, the State of Utah and the Coal Company. The Secretary committed error, after finding on the original appeal that Braffet had prima facie established that the lands were known coal lands on the date of the grant to Utah, in holding that a presumptive title was acquired by the State of Utah through the grant, which entitled the State to rebut Braffet's prima facie case, since it is settled law that known mineral land does not pass to the State by a school land grant.

In United States v. Sweet, 245 U. S. 563, Mr. Justice Van Devanter, considering the question of whether known mineral lands passed to the State of Utah under its grant of school lands, said: "Another statute indicative of the policy of Congress and pertinent to the present inquiry is the act of February 28, 1891, c. 384, 26 Stat. 796,

which defines the indemnity to which a State or Territory is entitled in respect of its school grant. In addition to dealing with deficiencies occurring in other ways, it provides, 'And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land.' In this there is a plain implication that where those sections are mineral—known to be so when the grant takes effect—they do not pass under the grant. And it does not militate against this implication that under another provision the State may surrender those sections and take other lands in lieu of them where, although not known to be mineral when the grant takes effect, they are afterwards discovered to be so."

This would seem to dispose of presumptive title or any other sort of title to know mineral land passing with the grant to the State; but in the present case we do not deem it important to consider the question of whether the presumptive title existed in the State or not. It may be suggested parenthetically that an established practice has grown up in the Land Department to the effect that where an application for the purchase of coal lands is made on school numbered sections, the applicant is given the status of a contestant with the burden upon him to establish that the lands were known coal lands at the date of the grant, the State in each instance being the contestee. This being an established practice of the Land Department, the courts would not feel inclined by extraordinary process to disturb a construction thus placed upon the land law and consistently adhered to by the department through a long period of time and upon the faith of which vested rights have been acquired and large expenditures made.

But that rule has no application here, since the contestee, the State, after being given an opportunity to produce testimony to defeat Braffet's prima facie case, voluntarily withdrew from the contest, thus surrendering any rights it may have had thereunder as contestee.

This leaves the case, however, subject to another rule of practice recognized by the department in cases where the application for entry or purchase is subject to contest. After a citizen has submitted required proof of compliance with the public land law and his entry has been placed of record, he is vested with a presumptive title to the land—a title such as precludes allowance of any other claim so long as his entry remains intact. The title of the entryman is not absolute, however, but it is still subject to investigation and scrutiny, and if found for any reason to be invalid, it is liable to cancellation. But cancellation can not emanate from thin air. It must rest upon a valid foundation, since the very existence of the entry segregates the land from the mass of the public domain, and a lawful reason must exist before an entryman can be deprived of his right.

Thus it will be observed that by the rule of practice established in the department, and indeed by the law as announced by the courts

in many cases, the moment that Braffet's application for purchase was placed of record in the local land office, he acquired an interest that could not be divested in favor of any other claim so long as his entry remained intact. It was in that condition when the Secretary ordered the case remanded to the local land office. Hence, it appears that under that theory of the case the State and the Coal Company, by their failure to further contest Braffet's claim, removed the only obstacle to the allowance of his application. By his submission of prima facie proof to the satisfaction of the Land Department that the lands were known coal land at the date of the grant to the State, and the failure of the State to rebut that proof, his application became complete and upon payment of the price he is entitled to a patent.

But it is sought to sustain this case on the lease subsequently executed to the Coal Company, on the theory that under section 2 of the leasing act, after stating the conditions under which the Secretary may lease mineral lands, the act provides: "That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants."

The only right which the Coal Company could assert on the date that Braffet applied to purchase was through its alleged title deraigned from the State of Utah. If Utah had no title, equitable or legal, it is difficult to understand where any equitable or legal right existed in the Coal Company; neither was such equitable right created by the surrender of its claims to the United States as a condition for the execution of the lease. The Secretary of the Interior has no power to barter leases in this way; nor could the rights of Braffet, which had become vested by the abandonment of the contest by the State and the Coal Company, be defeated in this manner.

The above provision of the leasing act, however, applies only to contesting applicants for a lease. Braffet was not an applicant for a lease, but was relying upon his right acquired long prior to the passage of the leasing act. With this valid right existing, no power inhered in the Secretary to lease the lands to anybody or under any conditions. Therefore, the provision of the act in question has no application whatever to this case.

This disposes of the further assignment of error to the effect that the Coal Company is an indispensable party to this suit. The Coal Company acquired no rights either through the State of Utah or through its lease that could in any way impair the right of Braffet acquired through the filing of his application to purchase. His case in the department and here must stand or fall upon the validity of that application. If the lands in question were vacant coal lands of the United States when the application was filed, then Braffet's right to complete his purchase can not be assailed. That the lands were vacant coal lands has been determined by the decision of the Secretary in the original appeal, 49 L. D. 212, as follows: "From a

careful consideration of the evidence, the department finds that the coal applicant has established prima facie that the land was known coal land on January 4, 1896; that the commissioner's finding in this respect was correct; and that the register and receiver erred in sustaining the motion to dismiss." The finality of the decision was accepted by the State not only by its refusal to submit further proof as to the character of the lands at the date of the grant, but by its withdrawal from the case and surrender of all title or interest in the lands. The Coal Company likewise recognized its finality by surrendering its alleged title in the lands to the United States and accepting in lieu thereof the lease. As before suggested, however, the Coal Company, which relied solely upon its title through deraignment from the State, is in no better position than its alleged grantor, and Braffet's rights can not be divested by the makeshift of the lease.

It may be suggested, however, that the position here assumed by the Secretary and the Coal Company is highly inconsistent,
21 since as a condition precedent to the execution of any sort of a pretended lease the Secretary must have relied upon his finding that the lands were known coal lands on the date of the grant to the State, and upon the further admission of that fact by the Coal Company. This concession by both parties to the lease, based upon the final judgment of the Secretary in the original appeal, gave the lands the status of vacant coal lands on the date Braffet filed his application to purchase.

Nor is the assignment of error to the effect that the United States is an indispensable party to this suit well founded. What is here sought to be accomplished is to compel the Secretary to perform the mere ministerial act of recognizing the validity of Braffet's application and permitting him, or in this case his administrator, to complete the purchase and to issue a patent therefor.

It is sought to make the United States an indispensable party through the injection into this case of the lease with the Coal Company. The lease and the leasing act have nothing whatever to do with this case. The rights of Braffet were recognized by the acceptance and record of the application in the local land office and became established by the decision of the Secretary in the original appeal and the abandonment of the contest by the State of Utah. The proceedings following that by the Secretary had no effect whatever upon the rights already acquired by Braffet.

The decree entered herein, among other things, enjoins the Secretary "to vacate and set aside the decision of the Department of the Interior of July 31, 1922, referred to in the amended bill of complaint, and in all respects to affirm the prior decision of the Commissioner of the General Land Office." This portion of the decree, if essential in this case, would be beyond the jurisdiction of the court, as it would amount to the control by extraordinary remedy of the discretion of the Secretary in a matter in which he was compelled by

law to act. But for the reasons we have set forth in this opinion, the portion of the decision of the Secretary finding that Braffet's proof established that the lands in question were known coal lands on the date of the grant to the State, and the subsequent failure of the State to further contest the case, made that finding final; and in that respect, which is the only material part for the purposes of this case, the decision of the Commissioner of the General Land Office was affirmed.

We, therefore, direct the modification of the decree below to a decree enjoining the Secretary to recognize the application as valid, to permit the administrator of Braffet to complete the purchase, and to cause to be issued to him a patent for said lands.

The decree is reversed without costs, and the cause is remanded for modification of the decree in accordance with the views expressed herein.

22 In Court of Appeals of District of Columbia

[Title omitted.]

Judgment

April 4, 1927

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby reversed without costs, and that this cause be and the same is hereby remanded to the said Supreme Court for modification of the decree in accordance with the views expressed in the opinion of this court.

Per Mr. Justice Van Orsdel.

April 4, 1927.

23 In Court of Appeals of the District of Columbia

[Title omitted.]

Motion to stay mandate

Filed April 20, 1927

On the 20th day of April 1927, comes into open court Hubert Work, Secretary of the Interior, by his counsel of record, O. H. Graves, and advises the court that an application will be made to the Supreme Court of the United States, in due course, praying that said court direct to this court its writ of certiorari requiring the transmission thereto of the record herein, for review:

Wherefore, appellant prays that this court stay the issuance of its mandate herein for a period of three months from April 4th, 1927, the date this court rendered its opinion.

O. H. GRAVES,
Assistant to the Solicitor.

_____,
Attorney for Appellant.

CC mailed to Edmund Burke; communicated by phone with Mr. Rourke, of counsel. No objection made.

[File indorsement omitted.]

24 In Court of Appeals of District of Columbia

[Title omitted.]

Order granting motion to stay mandate

April 23, 1927

On consideration of the motion to stay the mandate for 3 months in the above entitled cause pending application for certiorari, it is ordered by the court that said motion be and the same is hereby granted.

25 In Court of Appeals of District of Columbia

[Title omitted.]

Order further staying mandate

April 30, 1927

It is ordered by the court that the order of April 23, 1927, staying the mandate in the above-entitled cause, be and the same is hereby amended so as to stay the mandate until further order.

26 In Court of Appeals of the District of Columbia

[Title omitted.]

Designation of record

Filed June 24, 1927

The clerk in the preparation of the transcript of the record on petition for certiorari to the Supreme Court of the United States in the above-entitled cause will include therein the following papers and proceedings, to wit:

1. Record.

2. Suggestion of death of party Braffet and appointment of administrator.
3. Submission of cause.
4. Opinion of the court.
5. Decree.
6. Motion to stay mandate.
7. Order granting motion to stay mandate.
8. Order of April 30th amending motion to stay mandate.
9. This designation.

O. H. GRAVES,
Attorney for Appellant

[File indorsement omitted.]

27 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

Order allowing certiorari

Filed October 24, 1927

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 32,796. Court of Appeals, District of Columbia. Term No. 344. Hubert Work, as Secretary of the Interior, petitioner, vs. Robert L. Braffet, administrator of the estate of Mark P. Braffet, deceased. Petition for writ of certiorari and exhibit thereto. Filed July 1, 1927. File No. 32,796.

COURT OF APPEALS, DISTRICT OF COLUMBIA

OCTOBER TERM, 1926

No. 4528

HUBERT WORK, AS SECRETARY OF THE INTERIOR, APPELLANT

vs.

MARK P. BRAFFET, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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20142—26——1

a Supreme Court of the District of Columbia

In equity. No. 42382

MARK P. BRAFFET, PLAINTIFF

vs.

HUBERT WORK, AS SECRETARY OF THE INTERIOR, DEFENDANT

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Amended bill of complaint*

Filed June 12, 1924

In the Supreme Court of the District of Columbia

In equity. No. 42382

MARK P. BRAFFET, PLAINTIFF

vs.

HUBERT WORK, AS SECRETARY OF THE INTERIOR, DEFENDANT

To the Supreme Court of the District of Columbia:

Comes now the above-named plaintiff, and for this amended bill of complaint, consent of the court first being had, complains herein against the defendant as follows:

I

That said plaintiff is a citizen of the United States and a citizen of and resident in the State of Utah; that at all the times herein mentioned he was upwards of twenty-one years of age and was and still is qualified in all respects to purchase known coal lands of the United States, pursuant to law in relation thereto; that he brings this suit in his own right and not otherwise.

II

That the above-named defendant is the duly appointed, qualified, and acting Secretary of the Interior, and temporarily a resident in the District of Columbia, and is sued herein in his representative capacity and not otherwise.

2 III

That at the United States land office at the city of Salt Lake, in the State of Utah, and on February 4, 1918, this plaintiff filed in

said land office his application under the provisions of section 2347, U. S. Revised Statutes, to purchase the following-described known coal lands, and known as such on the date of the admission of the State of Utah, which were a part of the public lands of the United States and then subject to purchase by this plaintiff, and not otherwise appropriated or reserved under the laws of the United States, situate in the State of Utah and county of Carbon, and more particularly described as follows, namely: SE. ¼ of sec. 32, township 12 S., range 10 E., S. L. M., and thereupon and at the same time paid to the register and receiver thereof the fees required by law therefor and received thereupon their receipt therefor; that said application is serial No. 022470, and subsequently there was endorsed thereon, pursuant to the order and direction of the Department of the Interior, the following directions and words, namely: "Suspended pending disposition of contest 3655."

IV

That thereupon the said register and receiver, and on the 25th day of July, 1918, directed a notice of publication of said application, and thereupon a publication thereof was had in a newspaper as directed, published in the vicinity of said lands, and which, amongst other things, directed all persons to file any and all objections they may have had to the said application on or before the expira-
3 tion of thirty days from the 25th day of July, 1918, and thereon notice of said application was given to the State of Utah.

V

That on the 13th day of August, 1918, the State of Utah intervened in said application, proceeding on the ground that the title to said lands had passed to said State by reason of the school-land grant to said State contained in the Utah enabling act of date of January 4, 1896; and about the same time the Pleasant Valley Coal Company, a corporation created and existing pursuant to the laws of Utah, and whose major stock was then owned by the Utah Fuel Company, a corporation created and existing pursuant to the laws of New Jersey, and whose major stock was then owned by the Denver and Rio Grande Railroad Company, a railroad corporation, also intervened in said application on the ground that it claimed title in fee under and through a patent from said State of Utah for said lands, and that said lands were agricultural only in character and claimed by the said State of Utah under its enabling act.

VI

That on or about the 25th day of July, 1918, the said register and receiver approved said application and subsequently directed said plaintiff to complete his purchase by payment within fifteen days thereafter at the price designated in the classification price thereof; but before the expiration of said period, by order of the Depart-
ment of the Interior therein, said payment therein was sus-
4 pended and deferred until the determination of the contest by said department, all of which more fully appears hereinafter.

VII

That in said proceedings it was determined that said lands were known coal lands at the date of the admission of Utah into the Union of the States, on and prior to January 4, 1896.

VIII

That on the 18th day of February, 1920, after a hearing in the local land office arising under said contest by the State of Utah and said Pleasant Valley Coal Company, the application of plaintiff was dismissed, and thereupon plaintiff appealed therefrom, and within thirty days thereafter, to the Commissioner of the General Land Office, and in the proceeding therein on appeal the action of said local land office was wholly reversed and direction made therein that plaintiff be allowed to complete his purchase of said known coal lands.

IX

That thereupon the said contestants appealed from said order to the Secretary of the Interior, and in proceedings had therein and on the 31st day of July, 1922, an order was made remanding said proceeding to said local office to permit said State of Utah to offer additional proofs therein and directing the Government to formally intervene therein.

X

That thereafter and without notice to the plaintiff, and without his knowledge, privity, or consent, the said State of Utah filed with the said register and receiver in said local land office and in said appeal proceeding its abandonment of said contest and of any claim on its part of any title in or to said lands, and admitting said lands were known coal lands at the date of the admission of Utah into the Union of States; and thereupon the Pleasant Valley Coal Company did likewise; and thereupon and without notice to plaintiff, and without his knowledge, privity, or consent, and on the 8th day of January, 1924, and on representations and statements made to the Secretary of the Interior by the officers, agents, and attorneys of said State of Utah and Pleasant Valley Coal Company, and of which plaintiff had no knowledge or notice, and wholly without notice to or knowledge, privity, or consent of plaintiff, the Secretary of the Interior closed said proceedings without notice to plaintiff before or since.

XI

That all of said section 32 was excepted from the school land grant to Utah, the same being known coal lands at the date of the grant, and Utah had no right, title, or interest, or presumptive title therein or to any part thereof, and no legal, equitable, or presumptive title passed to Utah thereby or thereunder to said section 32 or to any part thereof; but the same remained a part of the public domain of the United States and subject to mineral entry and to purchase under the coal laws of the United States by plaintiff and said applicants.

6

XII

That heretofore and after learning for the first time of the closing of the said proceeding, as aforesaid, and on the 15th day of March, 1924, plaintiff made application to the Department of the Interior to reopen said proceedings, but on the 24th day of March, 1924, said application was denied, and plaintiff has fully exhausted the procedure of said Department of the Interior in the establishment of his rights and claim and has no further remedy or procedure therein and has no adequate remedy at law.

XIII

That heretofore and on the 4th day of February, 1918, one Agnus J. Mullings made similar application to purchase S. ½ NW. ¼, E. ½ SW. ¼, sec. 32, township 12 S., range 10 E., S. L. M.; as did also one Robert J. Turner to purchase NE. ¼ id.; and as did also one John H. Woodmansee to purchase N. ½ NW. ¼ id.; and on the 9th day of October, 1919, one Robert W. Hopkins made application to purchase W. ½ SW. ¼ id. in the same manner as did the plaintiff, as aforesaid; and similar publications, proceedings, and contests following said respective applications by the same said parties, the State of Utah and Pleasant Valley Coal Company, it was agreed and stipulated by the said parties, and which stipulation was agreed to by the Department of the Interior, that the disposition of the same should abide the final disposition of the said proceeding of the plaintiff.

Therefore plaintiff prays, amongst other things, that similar action be had herein based on said stipulations, so that a multi-

7 plicity of suits concerning the same subject matter may be avoided, or that they be included as defendants herein, in that their several rights under their several applications to purchase the said designated lands be determined and adjudicated in this suit, or that they be severally permitted to intervene herein, for adjudication and determination of their respective rights arising under their said respective applications to purchase as aforesaid; and it is further alleged applicants were severally qualified in every respect to make and perfect their said respective applications; that said respective applicants have no adequate remedy at law.

XIV

That at the time of said application of plaintiff the said lands had been divided into legal subdivisions under an approved survey by the United States and had been classified by the United States as known coal land.

XV

That at the time of plaintiff's said application and ever since the plaintiff was and now is ready, able, and willing to complete his said purchase and to pay the classified price thereof, which is the reasonable value thereof.

XVI

That subsequent to the closing of said contest and dismissal of said proceeding, as aforesaid, plaintiff basing his application on the said proceedings of the State of Utah, the Pleasant Valley Coal Company, in withdrawing from said contest proceeding, and the Secre-
8 tary defendant, as aforesaid, and setting forth the same in extenso, moved to reopen his said proceeding, but said Secretary defendant denied said application, and plaintiff is now without remedy therein, having fully exhausted the procedure, rules, and regulations of the Department of the Interior in such instance and in the establishment and maintenance of his rights therein.

Wherefore plaintiff prays that a writ of subpœna issue directed to said Secretary defendant, requiring him to appear herein and answer the exigencies of this bill of complaint; that a mandatory injunction issue against the defendant Secretary, directing that the decision of the Department of the Interior of July 31, 1922, be vacated, and that the prior said decision of the Commissioner of the General Land Office be affirmed in all respects, and that it be further adjudicated and decreed that the said application of plaintiff was valid, and that he be permitted by the defendant Secretary to complete his purchase of said lands in the manner provided by law, and thereupon that a patent shall issue to plaintiff therefor.

That plaintiff may have such other and further relief as may be just and equitable.

HENRY R. HARRIMAN,
EDMUND BURKE,
Attorneys for Plaintiff.

JMF.

9 UNITED STATES OF AMERICA,
District of Columbia, ss:

Edmund Burke, being duly sworn, deposes and says:

That he is one of the attorneys for plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to his best information and belief. That the plaintiff is absent from the District of Columbia.

EDMUND BURKE.

Subscribed and sworn to before me this 11th day of June, A. D. 1924.

(Notarial seal.)
JMF.

FRANCIS L. NEUBECK,
Notary Public, D. C.

Stipulation as to action in cases Nos. 42421, 42422, 42423, and 42424

Filed April 25, 1924

* * * * * * *

It is hereby stipulated by and between the attorneys for the above-named parties that the above-entitled actions abide the determination by this court of the issues in the suit in equity, No. 42382,

wherein Mark P. Braffet is plaintiff and Hubert Work as Secretary of the Interior is defendant.

Dated April 7, 1924.

EDMUND BURKE,
HENRY R. HARRIMAN,
Attorneys for Plaintiffs.
C. EDWARD WRIGHT,
Attorney for Defendant.

10 *Answer*

Filed June 9, 1924

* * * * * * *

The defendant, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies of the plaintiff's bill of complaint in the above-entitled suit, and especially saving and reserving all benefit and advantage from those matters hereinafter set forth as grounds for the dismissal of said bill, for answer to said bill or so much thereof as he is advised is material, says:

1. He admits the averments of paragraph 1.

2. He admits the averments of paragraph 2.

3. He admits that on February 4, 1918, at the United States land office at Salt Lake City, Utah, plaintiff filed application under Revised Statutes, section 2347, to purchase the SE. ¼ of sec. 32, T. 12 S., R. 10 E., S. L. M., as coal land of the United States, that he paid a filing fee of $10 therefor, that said application was given serial number 022470, and that subsequently the application was indorsed as averred in said paragraph; but he further says that by act of Congress approved July 16, 1894, sec. 32 of every township in the State of Utah was granted to said State for school purposes; that the aforesaid section had been officially surveyed prior to the admission of Utah into the Union and was returned as nonmineral in character; that on July 3, 1907, the General Land Office classified said land, as of that date, as coal land, which classification
11 was in force at the time of plaintiff's said application; that at the date of filing said application, however, it had never been determined that the land was of known mineral character at the date when the said school-land grant to the State of Utah attached; that said State claimed that it took title to each granted school section whether the same was mineral or nonmineral; that for some years prior to plaintiff's application the validity of said claim, to wit, that the State took title to granted sections regardless of mineral character, had been in litigation (United States v. Sweet, 245 U. S., 563), the ultimate decision of the Supreme Court being that it did not so take title to land known to be mineral at the time when the State's rights otherwise would have attached; that pending said litigation, and on November 10, 1915, the Secretary of the Interior had suspended the functions of local land officers, including the land officers of the said Salt Lake City land office, affecting coal-land applications for lands included in school sections, and had directed said officers to receive and transmit all

applications to enter, based on alleged mineral character of land, to the General Land Office until further directed; that said instructions were in full force and effect on February 4, 1918, and until June 13, 1918, and that during said period said officers had no authority to take any action on any such application other than simply to receive and transmit the same to the General Land Office; that the State of Utah long prior to the filing of said application by the plaintiff claimed the land in controversy under its school-land grant and had actually sold said land in 1902 to a
12 party, the grantor of the Pleasant Valley Coal Company, hereinafter mentioned, all of which was then and there well known to the plaintiff; that the defendant is informed and believes and therefore avers that in the year 1902 plaintiff was the attorney for the said Pleasant Valley Coal Company and so continued to be until the year 1917, much of said period being either general attorney or general solicitor of said company and occupying offices with said company; that during said relation of attorney and client plaintiff well knew of the asserted claim of title to said land by said company and of its deraignment from the said State of Utah; that the land, at the time of filing said application, was not vacant coal land of the United States not otherwise appropriated or reserved by competent authority and was not subject to entry under the provisions of Revised Statutes, section 2347; that the land having been returned as nonmineral in character, title had presumably passed to the State of Utah upon its admission as a State and was in the State unless and until, after proper proceeding and due process of law, it had been found and determined that the land was actually known to be mineral in character at the time when the State's title, if at all, attached; that the filing by plaintiff of his said application to purchase said land constituted in effect but an application to contest the presumed title of said State, and it was so treated; and that the said application was not subject to acceptance and allowance unless and until it should be determined, as aforesaid, that said land was in fact known to be mineral in character at the date of the admission of Utah into the Union.

13 4. Answering the averments of paragraph 4, he admits the same and alleges that the said notice was published in the Helper Times, a newspaper of general circulation published near said land, for five consecutive weeks, beginning August 2 and ending August 30, 1918, a like notice being posted in the said Salt Lake City land office.

5. Answering the averments of paragraph 5, he says that on or about August 13, 1918, the State of Utah, claiming title to said land as aforesaid, filed a protest against the allowance of plaintiff's said application and that the Pleasant Valley Coal Company at or about that time joined in the protest, asserting title through or under the State; but as to the ownership of the stock of said company, if the same be material, he is advised and believes, and therefore avers, that at that time the stock of the Utah Fuel Company, owner of all but 20 shares of the stock of the said Pleasant Valley Coal Company, was owned by William Salomon and Company of New York.

6. Answering the averments of paragraph 6, he states the facts to be as follows: That on June 13, 1918, the order of November 10,

1915, referred to in paragraph 3 of this answer, was rescinded and thereupon, and on July 25, 1918, the local land officers allowed the application of the plaintiff as an application and directed the issue of notice hereinbefore mentioned; that the record in the case fails to substantiate all other averments in paragraph 6 of the bill of complaint and the defendant is without any information whether the same be true; but he avers that on March 6, 1903, a circular of
14 instructions approved by the Secretary of the Interior issued out of the General Land Office, which circular was in full force and effect at the date of filing of plaintiff's application as well as at the date of issue of notice thereon, as aforesaid, which circular in terms provided:

"When a school section is identified by the Government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as contest cases;"

and that by decision of the said Secretary in the case of State of Utah (32 L. D. 117, 118), dated May 5, 1903, it was held that coal land filings covering lands within school sections—

"should not have been allowed in the absence of a determination (upon notice to all parties interested, as in other contest cases), that the lands were known to be chiefly valuable for coal deposits at the date the State was admitted into the Union."

He avers that if the allegations of paragraph 6 of the bill be true the local officers acted without authority and contrary to the regulations of the department and that such acts were void and of no effect; but he further avers the real intendment and effect of what was in fact done by said local officers was to allow plaintiff's application as the initiation of a contest proceeding against the State, and as a matter of fact he alleges it was so treated and ultimately disposed of as an application to contest.

7. He denies the averment of paragraph 7, if thereby the plaintiff means the proceedings before the local land office, and states
15 the fact to be that said local land officers, after due hearing in the contest proceeding between the plaintiff on the one hand and the State of Utah and the Pleasant Valley Coal Company on the other hand, decided that said land was not known to be coal land at the date of admission of Utah into the Union.

8. Answering the averments of paragraph 8, he states the facts to be that at the hearing before the local land officers plaintiff took the burden of proof that the land was known to be mineral land at the time when otherwise the State's title would have attached and introduced evidence supporting his case; that at the conclusion there of the State of Utah and the Pleasant Valley Coal Company, intervener, filed a motion to dismiss in the nature of a demurrer to the evidence, which motion was sustained by the local land officers without hearing any testimony introduced in behalf of the State's claim that thereupon plantiff appealed from the decision and judgment of said local land office to the Commissioner of the General Land Office

that thereupon, and on February 28, 1921, the Commissioner of the General Land Office rendered his judgment and opinion, reversing said local land officers, and in said judgment did order, and not otherwise, that:

"The protest of the State is hereby held for dismissal, subject to the right of appeal within 30 days from notice to the Secretary of the Interior."

9. He admits the allegations of paragraph 9 and states that the decision of the Secretary therein referred to is entitled State of Utah, Pleasant Valley Coal Company, intervener, v. Braffett, and is reported in 49 Land Decisions at p. 212; judicial notice thereof being respectfully requested for a further and more detailed
16 account of the proceeding therein duly had in the Interior Department, the same as if in detail specifically plead in this answer; and in further answer to said paragraph 9 the defendant avers that in and by said decision it was ruled that the Commissioner of the General Land Office erred in his order set forth in paragraph 8 of the answer, in that he should have reversed the local land officers only to the extent of remanding the case with directions to overrule the motion to dismiss with leave to the State and the intervener to proceed with their case and to introduce evidence if so advised, as provided in the rules of practice of the Land Department; and that further it was held that the plaintiff's application was nothing more, in law, that an application to contest the right of the State to the land, that no preference right to enter the land could accrue to the plaintiff under his contest even if successful, that in the meantime the general leasing act of February 25, 1920 (41 Stat. 437), had become the law, which said act repealed all previous laws authorizing the sale of coal land except as to claims within the saving clause of section 37 of said act, and that plaintiff's application was not a valid claim within the meaning of said saving clause. Whereupon the defendant in said opinion and judgment of July 31, 1922, formally rejected plaintiff's coal application and remanded the case to the local land office for the submission of further evidence, and directed the formal intervention of the Government, to be represented by an officer of the field service of the General Land Office, and provided for the further prosecution of the contest by the Government
17 in the event that plaintiff did not proceed as a contestant.

10. He denies the allegations in paragraph 10 of the bill, save such as are hereinafter stated and says that the facts are as follows: That subsequent to the rendition of the decision of the Secretary on July 31, 1922, as aforesaid, both the plaintiff and the Pleasant Valley Coal Company filed motions for rehearing, which in due course were denied on October 31, 1922; that the plaintiff then filed a petition for the exercise of supervisory authority, which was denied by the defendant on December 28, 1922; and that on said last-mentioned date, the State of Utah, through its attorney general, executed a withdrawal, and prayed a dismissal, of its protest, but without prejudice to the interests or rights of the intervener, the said Pleasant Valley Coal Company, for the reason, as therein set forth, that it had no beneficial interest in the land in controversy because on or about May 14, 1902, it had parted with its title by issuing its patent therefor to one, Laura Bird. And he

further alleges that on or about August 3, 1921, the United States had issued its lease to the Pleasant Valley Coal Company, under the leasing act of February 25, 1920, aforesaid, for certain other lands situate near sec. 32, T. 12 S., R. 10 E., containing 1,560 acres; that on March 2, 1923, said company filed with the defendant an application for the modification of said lease so as to include therein all of said sec. 32 (whereof the land in controversy is the SE. ¼); that in said application said company set forth that the State of Utah had offered said land at public sale in 1902, that it was pur-
18 chased by and patented to said Laura Bird, and that the said Bird had deeded the title so acquired to the said company, which since 1902 had been the record owner of said land in good faith and had since said date paid all real-estate taxes levied upon said land; that by decisions of July 31, 1922, October 31, 1922, and December 28, 1922, the department had finally rejected the application of the plaintiff for the land, but had remanded the case for further hearing to determine the known character of said land on the date of admission of the State of Utah into the Union, and in said decisions had laid a rule of evidence, to wit, that the mineral character of the land might be established solely by testimony of the value of neighboring land and by showing as a matter of probability and inference the extension into this land of coal beds known to exist in the vicinity; that rather than to proceed to a further hearing, with the incidental delay and expense, and with the possibility of ultimate litigation in the courts for the protection of its asserted rights as the mesne grantee of the State, and to obviate further controversy with the United States as to the validity of its title, it offered to waive its claim to the legal title and to take a leasehold tenure therein conditioned upon the inclusion of said land in its coal-land lease, aforesaid, expressly stipulating, however, that until the granting of such modified lease it retained its asserted legal right to the possession of the land as the mesne grantee of the State of Utah with all power reserved to maintin its title before the Land Department or any other tribunal; that thereupon, as by section 2 of the act of February 25, 1920, the
19 Secretary was authorized, among other things, to consider and recognize in awarding coal-land leases equitable rights of persons who claim such lands in good faith, and inasmuch as on the record the Pleasant Valley Coal Company was found to be a claimant in good faith, and inasmuch as the modification of said lease would be to the interest of the United States, the Commissioner of the General Land Office, acting under the authority of the defendant, on April 2, 1923, notified the register and receiver of the local land office at Salt Lake City that the Secretary had entertained said application to include the land in controversy in said lease and directed the usual publication of notice required by section 12 of the coal-leasing regulations; that thereafter such notice was given, calling upon all persons having adverse or conflicting claims to the land or any part thereof to file a protest or objection on or before May 25, 1923, else any such protest or objection against the granting of the lease would be disregarded; that said notice was posted in the Salt Lake City land office and was published in the

Helper Times, a newspaper of general circulation, for a period of five successive weeks beginning April 13, 1923; and that no protest or objection was filed by plaintiff or by anyone against the granting of said lease; that he admits that so far as he knows plaintiff did not consent to this action, but whether he had actual notice thereof he is without information other than as appears in plaintiff's averment in said paragraph 10. Further answering, he avers that on June 4, 1923, said lease of August 3, 1921, was modified by
20 the inclusion of said section 32 therein, and the lease so modified was on that date approved by the defendant; that said lease is now in full force and effect; that under and by virtue of its ownership said Pleasant Valley Coal Company, lessee, is the owner of a leasehold estate in and to the lands described in said bill of complaint with the right to remove coal from said leased premises under certain covenants and conditions, including payments of an annual cash rental to the United States and a royalty of a certain sum per ton of coal mined therefrom, and under the obligation of mining a certain minimum tonnage per annum and of expending a prescribed sum in opening and developing said leased premises.

11. Answering the averments of paragraph 11, he states that whether or not said sec. 32 was excepted from the school-land grant to the State of Utah depends entirely upon the fact of its known character at the date when the grant became effective; that if the land was then known to be mineral in character title did not pass to the State; that if the land was not then known to be mineral in character full legal title did pass to the State, inasmuch as the law does not require issue of patent to the State of Utah or any other act or deed on the part of the Secretary to pass such title; and he alleges that, as hereinbefore shown by this answer, the question as to the known character of said land has never been determined finally by the Land Department for reasons hereinbefore appearing. But he is advised, and believes, and therefore avers that whether as a fact the land was known to be mineral at the time when otherwise the State's title would have attached presents an issue
21 immaterial in plaintiff's suit for the reason that prior to January 4, 1896, the date of admission of Utah into statehood, the land had been duly identified by public survey and had been returned as nonmineral in character and that prima facie a good title then and there vested in the State; that the land thereafter was not appropriable public land of the United States unless and until on proceedings duly had, to which the State of Utah or any privy in interest was a party, it was found, determined, and adjudged by the Land Department that the land was known mineral land on the date last above written; that until such an adjudication said land was not vacant coal land of the United States not otherwise appropriated or reserved by competent authority, but was land in the status where title thereto could not be disposed of by the Land Department as public land of the United States, nor could any person acquire any vested right or interest therein by any entry or application to enter under the public-land laws of the United States.

12. He admits that on or about March 14, 1924, the plaintiff filed a petition for the reopening of said proceedings, that the same was denied on March 24, 1924, and that plaintiff had fully exhausted the

procedure of the Interior Department in the establishment of his claim; but as to other allegations of fact in said paragraph he has no knowledge, and as to whether plaintiff has no adequate remedy at law he is advised that this allegation presents a conclusion of law which he need not answer.

13. He admits the allegations of paragraph 13, but avers that since the filing of plaintiff's bill herein the said Mullings, Woodmansee, Hopkins, and Turner have severally filed their similar bills of complaint in this court, and that the same are now pending under a stipulation to abide the outcome of this suit.

22

14. He admits the allegations of paragraph 14.

15. Answering the averments of paragraph 15, he states that he is without information concerning the same.

16. He admits the averments of fact in paragraph 16.

And now for further answer to said bill and for cause wherefore the said bill should be dismissed in part by reason of defects apparent on the face of the bill itself, he says:

(a) The Pleasant Valley Coal Company, lessee, as aforesaid and as by plaintiff's bill appears, is an indispensable party to this suit, in whose absence it should not proceed.

(b) That if by the averments of his bill it is meant that the lease to said company is for any reason invalid, and for such reason is not a bar to the relief sought by the plaintiff, the validity of said lease is not subject to collateral attack by the plaintiff herein in a suit to which said lessee is not a party, or to attack in any suit save a direct suit by the United States to annul or vacate said lease for good and sufficient cause.

(c) That by reason of plaintiff's failure to take any action by way of protest or objection to the inclusion of said land in said lease to the Pleasant Valley Coal Company, after due notice so to do, he is barred by his conduct from any relief such as is sought in this bill.

23

(d) That the suit in effect is one against the United States, which has not consented to be sued in this behalf.

(e) That aside from the objection to the maintenance of the bill for lack of indispensable parties the bill exhibits no facts which entitle the plaintiff to the relief sought or to any relief in equity.

(f) That by reason of the facts set forth in the pleadings it is apparent that the land sought to be purchased by the plaintiff was not at the time of his application therefor or since vacant coal land of the United States not otherwise appropriated, subject to purchase under the provisions of Revised Statutes, section 2347, but on the contrary was land in good faith and under color of title claimed in ownership by the Pleasant Valley Coal Company as mesne grantee of the State of Utah, claiming under its school-land grant, as plaintiff then and there well knew.

(g) And that this suit is brought for the purpose of compelling defendant to perform an illegal act, to wit, to effect the sale to plaintiff and to issue to him patent for public land not subject to sale but withdrawn from sale by the terms of the act of February 25, 1920, subject only to lease for the production of the mineral therein with royalty and rental reserved to the United States.

Wherefore he prays that the bill of complaint may be dismissed, that he may have judgment as at law for his reasonable costs, and that he may be permitted to depart hence without day.

HUBERT WORK,
Secretary of the Interior.
By his attorney: C. EDWARD WRIGHT,
Attorney for the Interior Department.

24 DISTRICT OF COLUMBIA, *ss:*

C. Edward Wright, being first duly sworn, says that he is attorney for the defendant and has read over and is acquainted with the contents of the aforegoing answer by him subscribed; that he is informed that the matters of fact therein set forth are true and he believes them to be true.

C. EDWARD WRIGHT,
Attorney for the Interior Deparment.

Subscribed and sworn to this 7th day of June, 1924, before me,

W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

(Notarial seal.)

Notice of motion

Filed June 16, 1924

* * * * * * *

To C. EDWARD WRIGHT, Esq.,
Attorney for Defendant.

Please take notice that on the 20th day of June, 1924, at 10 a. m. in equity division No. 2 of the Supreme Court of the District of Columbia, District Courthouse, in the city of Washington, the plaintiff will move to strike from the answer, on the ground that the same is redundant and immaterial, all allegations therein contained relating to the issuance of a lease by the Secretary of the
25 Interior to the Pleasant Valley Coal Company of the premises described in the complaint; and that on such motion the plaintiff will use the files in this suit.

HENRY R. HARRIMAN,
EDMUND BURKE,
Attorneys for Plaintiff.

JMF.

Order restoring causes to calendar

Filed January 6, 1925

* * * * * * *

Whereas, and on the 20th day of June, 1924, there was submitted to the honorable Wendell P. Stafford, a justice of the supreme court sitting in equity, the above-entitled cause, together with four other equity causes pending in said court to abide event, namely, Nos. 42421, 42422, 42423, and 42424; and

Whereas and subsequently a præcipe was entered by the plaintiff dismissing said causes without prejudice, whereupon the clerk of this court made an order dismissing said causes without prejudice; and

Whereas the parties hereto have agreed that the said causes shall be restored to the calendar of this court for submission under the bill and answer:

Now therefore it is ordered that the clerk of this court restore said causes to the calendar.

WENDELL P. STAFFORD,
Justice, Supreme Court, D. C.

No objection:

C. EDWARD WRIGHT,
Attorney for Defendant.

JANUARY 6, 1925.

26 *Decree*

Filed September 29, 1926

* * * * * * *

The above-entitled cause heretofore having been submitted for final decision and decree on the bill, answer, and stipulation of the parties, and the court after hearing argument of counsel for the respective parties, after due consideration of the issues involved, and being fully advised in the premises finds:

1. That the application of the plaintiff Braffet to purchase as coal land the tract herein involved is valid, entitles plaintiff to complete his purchase, and thereupon to receive a patent to the lands purchased.

2. That the Pleasant Valley Coal Company is not an indispensable party to this action; no right of said Pleasant Valley Coal Company to be affected by this decree.

3. That a mandatory injunction should issue from this court to the Secretary of the Interior directing him to vacate and set aside the decision of the Department of the Interior of July 31, 1922, referred to in the amended bill of complaint herein, and in all respects to affirm the prior decision of the Commissioner of the General Land Office; to further hold that Braffet's application is valid, that he is entitled thereunder to complete his purchase, and cause patent to issue in his favor upon such completed purchase.

Pursuant to the foregoing findings it is hereby,

Ordered, adjudged, and decreed, by the court, that the
27 prayer of the plaintiff, Mark P. Braffet, for mandatory injunction to the Secretary of the Interior be and the same is hereby granted and the clerk of this court will issue the same, in due course, in accordance with the findings of the court herein contained.

Dated September 29th, 1926.

O. K.:

EDMUND BURKE,
Attorney for plaintiff.

O. H. GRAVES,
Attorney for Defendant.

Whereupon the defendant, by his attorney, O. H. Graves, in open court, noted an appeal from the foregoing decree to the Court of Appeals of the District of Columbia, and it is hereby on the day aforesaid,

Ordered that the appeal be allowed and that execution of said decree be and the same is hereby stayed, pending said appeal.

By the Court.

WENDEL P. STAFFORD, *Justice.*

Assignment of errors

Filed September 29, 1926

* * * * * * *

The appellant assigns the following as errors of the Supreme Court of the District of Columbia in rendering its decree herein, viz:

1. The court erred in rendering judgment in favor of the plaintiff, Mark P. Braffet.

28 2. The court erred in holding to be valid the application of Braffet to purchase as coal land the tract involved and in holding that plaintiff thereby became entitled to complete said purchase and receive a patent.

3. The court erred in holding that a mandatory injunction should issue out of said court addressed to the Secretary of the Interior, and in ordering the issuance thereof directing him to vacate and set aside his decision of July 31, 1922, to affirm in all respects the prior decision of the Commissioner of the General Land Office and requiring him to hold Braffet's application to be valid and cause a patent to issue in his favor covering said land.

4. The court erred in ordering the Secretary of the Interior to issue a patent herein.

5. The court erred in finding and holding that the Pleasant Valley Coal Company is not an indispensable party to this action.

6. The court erred in failing to hold that the United States is an indispensable party to this action.

7. The court erred in failing to hold that the amended bill of complaint herein does not set forth facts sufficient to constitute a cause of action.

8. The court erred in failing to hold that the amended bill of complaint does not set forth facts sufficient to vest a court of equity with jurisdiction to grant the relief sought.

9. The court erred in failing and refusing to dismiss the amended bill of complaint in response to defendant's motion.

29 10. The court erred in failing to render judgment in favor of the defendant.

O. H. GRAVES,
Attorney for Appellant.

Designation of record

Filed September 29, 1926

* * * * * * *

The clerk in making up the transcript of the record of appeal will include the following pleadings therein:

1. The amended bill of complaint.
2. The amended answer.
3. The stipulation amending answer and making it applicable to equity Nos. 42421, 42422, 42423, and 42424.
4. Notice of motion bringing on for hearing the suggestion that the Pleasant Valley Coal Company is an indispensable party defendant.
5. Stipulation submitting cause on bill and answer after restoration to the calendar.
6. Assignment of errors.
7. This designation.

O. H. GRAVES,
Attorney for Appellant.

Service of the above designation acknowledged Sept. 29th, 1926.

EDMUND BURKE,
Attorney for Appellee.

O. K.:
EDMUND BURKE,
Atty. for plaintiff.

30 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 29, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 42382 in equity, wherein Mark P. Braffet is plaintiff and Hubert Work as Secretary of the Interior is defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of October, 1926.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

[Indorsement on cover:] District of Columbia Supreme Court. No. 4528. Hubert Work, as Secretary of the Interior, appellant, vs. Mark P. Braffet. Court of Appeals, District of Columbia. Filed Nov. 15, 1926. Henry W. Hodges, clerk.

WEDNESDAY, FEBRUARY 9, A. D. 1927.

Hubert Work, as Secretary of the Interior, Appellant

v.

Mark P. Braffet. No. 4528

The death of Mark P. Braffet, appellee in the above-entitled cause, and the appointment of Robert I. Braffet as administrator of his estate, was suggested to the Court by Mr. Edmund Burke, of counsel for the appellee. On consideration whereof, and upon motion and agreement of counsel in open court, It is ordered that Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased, be, and he is hereby, substituted as the party appellee in this cause, in the place and stead of the said Mark P. Braffet, deceased.

WEDNESDAY, FEBRUARY 9, A. D. 1927.

Hubert Work, as Secretary of the Interior, Appellant

v.

Robert I. Braffet, Administrator of the Estate of Mark P. Braffet, deceased. No. 4528

The above-entitled cause was submitted to the consideration of the court on the printed record and briefs filed herein by Mr. O. H. Graves, attorney for the appellant, and by Messrs. Edmund Burke, Simon H. Rourke, and John G. Jaeger, attorneys for the appellee.

Court of Appeals of the District of Columbia. Hubert Work, as Secretary of the Interior, appellant, *v.* Robert I. Braffet, Administrator of the Estate of Mark P. Braffat, deceased. No. 4528.

Before Martin, Chief Justice; Robb and Van Orsdel, Associate Justices.

Mr. Justice Van Orsdel delivered the opinion of the court:

This appeal is from a mandatory injunction issued by the Supreme Court of the District of Columbia directing Hubert Work, Secretary of the Interior, to issue a patent to the above-named appellee, Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased, to certain coal lands situated in the State of Utah.

It appears that Mark P. Braffet, a citizen of the United States, on the 4th day of February, 1918, applied to the officials of the local land office at Salt Lake City, Utah, to purchase as coal land, under section 2347 R. S., the S. E. ¼ of sec. 32, town. 12 S., R. 10, E., S. L. M.; that on the 13th day of August, 1918, the State of Utah intervened and contested the application on the ground that at the time the school land grant was made to Utah, under the enabling act

of January 4, 1896, the lands in question were not known to be coal lands; and that accordingly at that time title to the said lands vested in the State of Utah.

At about the same time the Pleasant Valley Coal Company, hereafter for convenience referred to as the coal company, a Utah corporation, intervened in said application on the ground that it held title in fee to said lands under a patent from the State of Utah, alleging that the lands were agricultural only in character and claimed by the State of Utah under the enabling act. The contest proceeded in the local land office and, at the conclusion of appellee's proof, the State of Utah moved to dismiss the application, which motion was granted. Appellee appealed to the Commissioner of the General Land Office, where the decision of the local land office was reversed, the commissioner sustaining the application as valid and holding that appellee was entitled to complete his purchase.

The State of Utah and the coal company appealed to the Secretary of the Interior, who reversed the commissioner, holding that Braffet had prima facie established that the lands were known coal lands at the time of the grant to Utah, but that his application could not be approved since the presumptive title to the lands was in the State. The Secretary held that the motion to dismiss was erroneous and remanded the case to the local land office, directing that the State of Utah be permitted to produce further proof, and permitting Braffet as the "contestant" to continue as such against the claims of Utah.

It is alleged in the answer, which for the purposes of this case must be taken as true, since the case was tried on bill and answer, that subsequent to the decision of the Secretary on July 31, 1922, Braffet and the coal company filed motions for rehearing, which were denied. Braffet then petitioned the Secretary for the exercise of supervisory authority, which was denied on December 28, 1922. On that day the State of Utah, through its attorney general, executed a withdrawal and prayed for a dismissal of its protest, without prejudice, however, to the interests of the coal company, alleging that it had no beneficial interest in the land, since on or about May 14, 1902, it had issued a patent therefor to one Laura Bird, who subsequently conveyed the lands to the Pleasant Valley Coal Co.

It is further alleged in the answer that on or about August 3, 1921, the United States, through the Secretary of the Interior, issued a lease to the coal company under the leasing act of February 25, 1920 (41 Stat. 437), for certain lands adjoining and in the vicinity of section 32; and on March 2, 1923, the coal company filed with the Secretary of the Interior an application for modification of its lease so as to include therein all of section 32, offering therein to waive its claim to the legal title to said land and to take a coal-land lease for the same, conditioning its waiver, however, upon the granting of the modified lease. The Secretary accordingly directed the Commissioner of the General Land Office to modify the lease of the coal company as requested, basing his action upon section 2 of the act of February 25, 1920, authorizing him in awarding coal-land leases to recognize equitable rights of persons who claim such land in good faith.

It is clear that this case must stand or fall upon the conditions existing on February 4, 1918, the date when Braffet filed his application for the purchase of the lands in question with the register of

the local land office at Salt Lake City. This application was filed under the provisions of section 2347, R. S. U. S., as follows: "Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

The sole question to be determined is whether or not at the date Braffet filed his application the lands in question were vacant coal lands of the United States. That they were vacant coal lands on that date is settled by the decision of the Secretary and the concession of the intervening claimants, the State of Utah and the coal company. The Secretary committed error, after finding on the original appeal that Braffet had *prima facie* established that the lands were known coal lands on the date of the grant to Utah, in holding that a presumptive title was acquired by the State of Utah through the grant, which entitled the State to rebut Braffet's prima facie case, since it is settled law that known mineral land does not pass to the State by a school land grant.

In *United States* v. *Sweet*, 245 U. S. 563, Mr. Justice Van Devanter, considering the question of whether known mineral lands passed to the State of Utah under its grant of school lands, said: "Another statute indicative of the policy of Congress and pertinent to the present inquiry is the act of February 28, 1891, c. 384, 26 Stat. 796, which defines the indemnity to which a State or Territory is entitled in respect of its school grant. In addition to dealing with deficiencies occurring in other ways, it provides, 'And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land.' In this there is a plain implication that where those sections are mineral—known to be so when the grant takes effect—they do not pass under the grant. And it does not militate against this implication that under another provision the State may surrender those sections and take other lands in lieu of them where, although not known to be mineral when the grant takes effect, they are afterwards discovered to be so."

This would seem to dispose of presumptive title or any other sort of title to known mineral land passing with the grant to the State; but in the present case we do not deem it important to consider the question of whether the presumptive title existed in the State or not. It may be suggested parenthetically that an established practice has grown up in the Land Department to the effect that where an application for the purchase of coal lands is made on school numbered sections, the applicant is given the status of a contestant with the burden upon him to establish that the lands were known coal lands at the date of the grant, the State in each instance being the contestee.

This being an established practice of the Land Department, the courts would not feel inclined by extraordinary process to disturb a construction thus placed upon the land law and consistently adhered to by the department through a long period of time and upon the faith of which vested rights have been acquired and large expenditures made.

But that rule has no application here, since the contestee, the State, after being given an opportunity to produce testimony to defeat Braffet's prima facie case voluntarily withdrew from the contest, thus surrendering any rights it may have had thereunder as contestee.

This leaves the case, however, subject to another rule of practice recognized by the department in cases where the application for entry or purchase is subject to contest. After a citizen has submitted required proof of compliance with the public land law and his entry has been placed of record he is vested with a presumptive title to the land—a title such as precludes allowance of any other claim so long as his entry remains intact. The title of the entryman is not absolute, however, but it is still subject to investigation and scrutiny, and if found for any reason to be invalid it is liable to cancellation. But cancellation can not emanate from thin air. It must rest upon a valid foundation, since the very existence of the entry segregates the land from the mass of the public domain, and a lawful reason must exist before an entryman can be deprived of his right.

Thus it will be observed that by the rule of practice established in the department, and indeed by the law as announced by the courts in many cases, the moment that Braffet's application for purchase was placed of record in the local land office he acquired an interest that could not be divested in favor of any other claim so long as his entry remained intact. It was in that condition when the Secretary ordered the case remanded to the local land office. Hence it appears that under that theory of the case the State and the coal company by their failure to further contest Braffet's claim removed the only obstacle to the allowance of his application. By his submission of prima facie proof to the satisfaction of the Land Department that the lands were known coal land at the date of the grant to the State and the failure of the State to rebut that proof his application became complete, and upon payment of the price he is entitled to a patent.

But it is sought to sustain this case on the lease subsequently executed to the coal company, on the theory that under section 2 of the leasing act, after stating the conditions under which the Secretary may lease mineral lands, the act provides: "That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants."

The only right which the coal company could assert on the date that Braffet applied to purchase was through its alleged title derived from the State of Utah. If Utah had no title, equitable or legal, it is difficult to understand where any equitable or legal right existed in the coal company; neither was such equitable right created by the surrender of its claims to the United States as a condition for the execution of the lease. The Secretary of the Interior has no power to barter leases in this way; nor could the rights of Braffet, which had become vested by the abandonment of the contest by the State and the coal company, be defeated in this manner.

The above provision of the leasing act, however, applies only to contesting applicants for a lease. Braffet was not an applicant for a lease, but was relying upon his right acquired long prior to the passage of the leasing act. With this valid right existing, no power inhered in the Secretary to lease the lands to anybody or under any conditions. Therefore, the provision of the act in question has no application whatever to this case.

This disposes of the further assignment of error to the effect that the coal company is an indispensable party to this suit. The coal company acquired no rights either through the State of Utah or through its lease that could in any way impair the right of Braffet acquired through the filing of his application to purchase. His case in the department and here must stand or fall upon the validity of that application. If the lands in question were vacant coal lands of the United States when the application was filed, then Braffet's right to complete his purchase can not be assailed. That the lands were vacant coal lands has been determined by the decision of the Secretary in the original appeal, 49 L. D. 212, as follows: "From a careful consideration of the evidence the department finds that the coal applicant has established *prima facie* that the land was known coal land on January 4, 1896; that the commissioner's finding in this respect was correct; and that the register and receiver erred in sustaining the motion to dismiss." The finality of the decision was accepted by the State not only by its refusal to submit further proof as to the character of the lands at the date of the grant, but by its withdrawal from the case and surrender of all title or interest in the lands. The coal company likewise recognized its finality by surrendering its alleged title in the lands to the United States and accepting in lieu thereof the lease. As before suggested, however, the coal company, which relied solely upon its title through deraignment from the State, is in no better position than its alleged grantor, and Braffet's rights can not be divested by the makeshift of the lease.

It may be suggested, however, that the position here assumed by the Secretary and the coal company is highly inconsistent, since as a condition precedent to the execution of any sort of a pretended lease the Secretary must have relied upon his finding that the lands were known coal lands on the date of the grant to the State, and upon the further admission of that fact by the coal company. This concession by both parties to the lease, based upon the final judgment of the Secretary in the original appeal, gave the lands the status of vacant coal lands on the date Braffet filed his application to purchase.

Nor is the assignment of error to the effect that the United States is an indispensable party to this suit well founded. What is here sought to be accomplished is to compel the Secretary to perform the mere ministerial act of recognizing the validity of Braffet's application and permitting him, or in this case his administrator, to complete the purchase and to issue a patent therefor.

It is sought to make the United States an indispensable party through the injection into this case of the lease with the coal company. The lease and the leasing act have nothing whatever to do with this case. The rights of Braffet were recognized by the acceptance and record of the application in the local land office and became established by the decision of the Secretary in the original

appeal, and the abandonment of the contest by the State of Utah. The proceedings following that by the Secretary had no effect whatever upon the rights already acquired by Braffet.

The decree entered herein, among other things, enjoins the Secretary "to vacate and set aside the decision of the Department of the Interior of July 31, 1922, referred to in the amended bill of complaint, and in all respects to affirm the prior decision of the Commissioner of the General Land Office." This portion of the decree, if essential in this case, would be beyond the jurisdiction of the court, as it would amount to the control by extraordinary remedy of the discretion of the Secretary in a matter in which he was compelled by law to act. But for the reasons we have set forth in this opinion, the portion of the decision of the Secretary finding that Braffet's proof established that the lands in question were known coal lands on the date of the grant to the State, and the subsequent failure of the State to further contest the case, made that finding final; and in that respect, which is the only material part for the purposes of this case, the decision of the Commissioner of the General Land Office was affirmed.

We therefore direct the modification of the decree below to a degree enjoining the Secretary to recognize the application as valid, to permit the administrator of Braffet to complete the purchase, and to cause to be issued to him a patent for said lands.

The decree is reversed without costs and the cause is remanded for modification of the decree in accordance with the views expressed herein.

MONDAY, APRIL 4, A. D. 1927.

Hubert Work, as Secretary of the Interior, appellant, *v.* Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased. No. 4528, April term, 1927.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be and the same is hereby reversed without costs, and that this cause be and the same is hereby remanded to the said supreme court for modification of the decree in accordance with the views expressed in the opinion of this court.

Per MR. JUSTICE VAN ORSDEL.

APRIL 4, 1927.

In the Court of Appeals of the District of Columbia. Hubert Work, Secretary of the Interior, appellant, *v.* Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased. No. 4528.

MOTION TO STAY MANDATE

On the 20th day of April, 1927, comes into open court Hubert Work, Secretary of the Interior, by his counsel of record, O. R. Graves, and advises the court that an application will be made

the Supreme Court of the United States, in due course, praying that said court direct to this court its writ of certiorari requiring the transmission thereto of the record herein for review:

Wherefore appellant prays that this court stay the issuance of its mandate herein for a period of three months from April 4, 1927, the date this court rendered its opinion.

O. H. GRAVES,
Assistant to the Solicitor.

_____ _____,
Attorney for Appellant.

CC mailed to Edmund Burke, communicated by phone with Mr. Rourke, of counsel. No objection made.

(Indorsed:) No. 4528. Hubert Work, &c., appellant, *v.* Robert I. Braffet, administrator, &c. Motion to stay mandate. Court of Appeals, District of Columbia. Filed April 20, 1927. Henry W. Hodges, clerk.

SATURDAY, APRIL 23, A. D. 1927.

Hubert Work, as Secretary of the Interior, appellant, *v.* Robert I. Braffet, administrator, &c. No. 4528

On consideration of the motion to stay the mandate for three months in the above-entitled cause pending application for certiorari, it is ordered by the court that said motion be and the same is hereby granted.

SATURDAY, APRIL 30, A. D. 1927.

Hubert Work, as Secretary of the Interior, appellant, *v.* Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased. No. 4528

It is ordered by the court that the order of April 23, 1927, staying the mandate in the above-entitled cause be, and the same is hereby, amended so as to stay the mandate until further order.

In the Court of Appeals of the District of Columbia. Hubert Work, as Secretary of the Interior, appellant, *v.* Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased. No. 4528

DESIGNATION OF RECORD

The clerk in the preparation of the transcript of the record on petition for certiorari to the Supreme Court of the United States in the above-entitled cause will include therein the following papers and proceedings, to wit:

1. Record.
2. Suggestion of death of party Braffet and appointment of administrator.

3. Submission of cause.
4. Opinion of the court.
5. Decree.
6. Motion to stay mandate.
7. Order granting motion to stay mandate.
8. Order of April 30 amending motion to stay mandate.
9. This designation.

O. H. GRAVES,
Attorney for Appellant.

(Indorsed:) No. 4528. Hubert Work, Secretary, appellant, *v.* Robert I. Braffet, etc. Designation of record on certiorari. Court of Appeals, District of Columbia, filed Jun. 24, 1927. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 26, inclusive, constitute a true copy of the transcript of record and proceedings of said court of appeals, per designation of counsel, in the case of Hubert Work, as Secretary of the Interior, appellant, *v.* Robert I. Braffet, administrator of the estate of Mark P. Braffet, deceased, No. 4528, April term, 1927, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 24th day of June, A. D. 1927.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. ——

HUBERT WORK, AS SECRETARY OF THE INTERIOR, petitioner

v.

ROBERT I. BRAFFET, ADMINISTRATOR OF THE ESTATE of Mark P. Braffet, deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General on behalf of Hubert Work, Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above-entitled cause on April 4, 1927 (R. 22), affirming the decree of the Supreme Court of the District of Columbia (R. 14).

STATEMENT OF FACTS

This case involves the question whether the Supreme Court of the District of Columbia has jurisdiction by mandatory injunction to direct the Secretary of the Interior to vacate his decision rejecting an application under Section 2347, R. S., for the purchase of lands said to contain coal included within the school land grant to the State of Utah, and further to direct the Secretary to issue to the applicant a patent for said lands upon his making payment therefor, where such decision of the Secretary was made by him in the exercise of the discretion vested in him by the applicable statutes and the rules and regulations of the Department of the Interior and the General Land Office.

The case was tried below on bill and answer, so that for the purpose of this petition the facts therein stated are not in dispute. So far as material here, the facts are as follows:

The land involved in the application is the SE. ¼ of Sec. 32, T. 12 S., R. 10 E., S. L. M., Salt Lake City land district.

This tract was included in the school land grant to the State of Utah under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107, granting to Utah Sections numbered 2, 16, 32, and 36, in every township of the proposed State. The grant became effective by the admission of the State into the Union January 4, 1896. (29 Stat. 876.) The official Government survey had returned the tract as of the

character which passed under the school-land grant, to wit, nonmineral. (R. 11.)

Continuously following the above grant, Utah claimed this tract as granted school lands, and in May, 1902, in due course, sold it for value to Laura Bird, who thereafter conveyed it to the Pleasant Valley Coal Company (hereinafter referred to as the "Coal Company"). (R. 10.)

March 6, 1903, Circular of Instructions (32 L. D. 39) was issued to local land offices, withholding school sections from entry, with directions to hold applications presented under the mining laws to be disposed of in the same manner as contests.

On November 10, 1915, the Secretary of the Interior suspended the functions of local land officers at the Salt Lake City land office as to coal land applications for lands included in school sections, and directed said officers to receive and transmit to the General Land Office all applications to enter, based on alleged mineral character of land, until further orders. Such instructions were in full force and effect to and including June 13, 1918. (R. 6, 7.)

On February 4, 1918, Mark P. Braffet filed in the local land office at Salt Lake City his application to purchase the above-described tract as coal land. Braffet's application to purchase was treated as a contest of Utah's title, under the rules and regulations of the General Land Office, and on July 25, 1918, citation was issued to the State of Utah in accordance with the rule of the General Land Office as to contests. (R. 6–8.)

On August 13, 1918, the State of Utah answered, controverting the contest, and specifically alleging the land to be agricultural in character and "not known coal land" on the date of the grant. The Coal Company intervened with like allegations and both parties prayed for equitable consideration. Braffet assumed the burden of his contest and introduced evidence in support of his claim at a hearing before the local land officers. The State of Utah and the Coal Company, without introducing proof, made a motion to dismiss. (R. 7, 8.)

The motion to dismiss was sustained, and on Braffet's appeal to him the Commissioner of the General Land Office reversed the local office and dismissed the claim of the State of Utah and the Coal Company for equitable consideration, from which action an appeal was taken to the Secretary of the Interior. (R. 8, 9.)

On July 31, 1922, the Secretary rejected Braffet's coal application and found him to be a contestant of Utah's title; held that he had made out a *prima facie* case that the land was known coal land on January 4, 1896, and remanded the case to the local office for the taking of further testimony. He further found that "by reason of the fact that the contestant can acquire no preferred right to the coal deposits and for the purpose of adequately protecting its interests the Government will formally intervene, and be represented by an officer of the field service. In the event that the contestant does not proceed with the contest it will be prose-

cuted by the Government." *Utah* v. *Braffet,* 49 L. D. 212, 224.

On February 25, 1920, while the proceedings above described were in progress and the land in question was *sub judice* in the Department, Congress passed the Coal Leasing Act, c. 85, 41 Stat. 437.

On or about August 3, 1921, the Pleasant Valley Coal Company had procured from the United States under the terms of the Coal Leasing Act a lease covering 1,560 acres near the tract in Section 32, involved herein. In March, 1923, following the rejection of Braffet's application, after due notice by publication and in response to a request therefor from the Coal Company, the only bidder, the Secretary of the Interior modified the prior lease of the Coal Company by including therein all of Sec. 32, the SE. ¼ of which was covered by Braffet's application. (Answer, Par. 10, R. 9–11.) By the terms of such lease the United States became entitled to a certain prescribed royalty upon every ton of coal mined, with right to demand a specific production, and also a fixed annual acreage rental. (R. 11.)

Thereafter, in 1924, Braffet filed his bill of complaint and defendant answered. An amended bill (R. 1) was thereafter filed, and the answer was amended to conform thereto.

The court entered its judgment for Braffet ordering a writ of mandatory injunction to issue against the Secretary of the Interior requiring him to per-

form the various acts therein enumerated. (Decree, R. 14.)

From this decree the Secretary appealed to the Court of Appeals of the District of Columbia. On April 4, 1927, that court sustained the lower court, but remanded the case for the correction of an immaterial error. (R. 17–22.)

QUESTIONS PRESENTED

On the date Braffet filed his application, February 4, 1918, the land in controversy was the subject of the *bona fide* claim of the State of Utah and its grantees, and was not "vacant coal land" subject to purchase. Braffet, therefore, under the rules and regulations of the Secretary of the Interior, was, as held by the Secretary, a mere contestant acquiring no rights to the land.

Prior to the conclusion of his contest, during which he was held to have made out a *prima facie* case against Utah and before Braffet had acquired any right to the land, Congress passed the Coal Leasing Act. Thereby this land, if it was coal land and belonged to the United States, was appropriated to the purposes of the Act and Braffet was entirely cut off from any right to acquire it under a prior law.

If in fact the lands in question were not within the class of lands granted to the State, nevertheless they were part of a designated school section and presumptively passed to the State, and in the absence of a determination of known coal character

at the time of the grant could not have been sold by the United States or become the basis of a lieu selection by the State. The Company, taking a grant from the State under these circumstances, became a *bona fide* claimant to the fee title, and when it exchanged this title in consideration of a lease to the lands acquired a substantial right, which right became the basis of a legitimate dispute. To litigation involving and to a decree determining the invalidity of this right, it is an indispensable party.

The United States asserts that at all times it has been the owner of the lands in question. To a decree holding its title void, and requiring the issuance of a patent conveying the lands to another, it is an indispensable party.

The action was brought in equity. The prayer is for mandatory relief, not injunctive, and only such relief has been awarded. Thus, obviously, an adequate remedy at law existed.

SPECIFICATION OF ERRORS

The Court of Appeals of the District erred—

1. In directing the court below to enter a decree enjoining the Secretary to recognize Braffet's application as valid, to permit the administrator of Braffet to complete the purchase, and to cause to be issued to him a patent for the lands in question;

2. In holding that the rules, regulations, and instructions of the Secretary of the Interior establishing a settled practice with reference to the purchase of lands contained within the limits of a school grant to a State, had no application to this case, and in failing to apply such rules hereto;

3. In holding that the application of Braffet to purchase the lands in suit vested in Braffet any right to purchase such lands after the passage of the Coal Leasing Act;

4. In holding that the lands in suit were at the time of the filing of Braffet's application "vacant coal lands of the United States" subject to entry and in holding that the *bona fide* claim of the State of Utah had no effect in withdrawing said lands from entry and that the established rules of procedure of the Land Department as to contests have "no application here." (This is contrary to *Stewart* v. *Peterson,* 28 L. D. 515, 519, quoted with approval in *Holt* v. *Murphy,* 207 U. S. 407; see also *Germania Iron Co.* v. *James,* 89 Fed. 811);

5. In directing the issuance of a patent herein to Braffet, the effect of which will be to divest the United States of all title to the tract which it has leased to the Pleasant Valley Coal Company under the Coal Leasing Act, in the absence of the United States and of the Pleasant Valley Coal Company, both indispensable parties; and

6. In failing to hold that there was no basis for the exercise of equitable jurisdiction, where, as is

apparent from the decree, an adequate remedy at law existed.

REASONS FOR GRANTING THE WRIT

The reasons why the writ should issue are:

1. The decision of the Court of Appeals denies that force and efficacy to the rules, regulations, and instructions of the Secretary of the Interior, issued by him in the due exercise of his authority, judgment, and discretion, as the administrator of the public land laws of the United States, recognized by the law, and the decisions of this Court. The effect of the court's decision is to overturn a settled practice of the Land Department, long followed and observed by it, and to set up in place thereof a new rule of law, which in its operation could not be confined to this particular case, and the general effect of which will be so far-reaching in the future administration of these laws, as to warrant consideration thereof by this Court;

2. The decision of the Court of Appeals fails to give effect to the Coal Leasing Act of February 25, 1920, as to coal lands of the public domain, title to which did not pass under the school land grant;

3. The decision of the Court of Appeals places an erroneous interpretation on the term "vacant coal lands" as used in Section 2347, R. S., and entirely disregards the effect of a *bona fide* claim, as withholding a tract of those lands from public entry;

4. The title to land has been determined by the decision, in the absence of parties indispensable thereto; and

5. The jurisdiction of the court to extend any relief whatsoever, in the form of proceeding selected and pursued, seems incompatible with the decisions of this Court distinguishing between actions at law and in equity.

For these reasons it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1927.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The Supreme Court of the District of Columbia rendered no opinion; its decree appears at page 14 of the Record. The opinion of the Court of Appeals of the District of Columbia (R. 17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1927. (R. 22.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

Section 2347, R. S. (see U. S. C., Title 30, Sec. 71), provides:

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Section 2351, R. S. (see U. S. C., Title 30, Sec. 75), provides:

> * * * The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

The Act of February 25, 1920, c. 85, 41 Stat. 437, 438, 451 (see U. S. C., Title 30, Secs. 181, 201, 193), contains the following provisions:

> SEC. 1. That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United

States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities * * *.

SEC. 2. That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by

competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided,* That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: * * * *And provided further,* That no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: * * *.

* * * * *

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal-mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery,

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition for certiorari.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE APPLICABLE STATUTES AND TO THE RULES AND REGULATIONS OF THE LAND OFFICE

In this case the lower courts have assumed jurisdiction to review and correct by mandatory injunction decisions of the special tribunal created under the Constitution of the United States for the purpose of administering the sale of public lands of the United States, and as a necessary step in such action have disregarded rules and regulations established by the Secretary of the Interior and by the Commissioner of the General Land Office.

The decision below directs the Secretary to vacate his decision upon matters of fact involving the exercise of the essential discretion vested in him by the statutes and by the rules and regulations referred to, not merely the performance of a ministerial act. This action goes far beyond the limitations upon judicial power laid down by the decisions of this Court.

II

THE POWER OF THE COURTS TO REVIEW ACTION OF THE LAND DEPARTMENT IS EXTREMELY LIMITED

In *Steel* v. *Smelting Company*, 106 U. S. 447, this Court sustained a patent to mineral lands against

collateral attack. Referring to the effect of decisions of the Land Department it was held, at page 450:

> We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *United States* v. *Schurz*, 102 U. S. 378, at page 395, this Court said:

> The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and

regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. "*This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet in fieri, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.* (Italics ours.)

The paragraph last quoted was quoted with approval in *Plested* v. *Abbey*, 228 U. S. 42, at page 51, a case in which this Court held squarely that (p. 50)—

> while the title to public lands remains in the United States and the proceedings for acquiring that title are still *in fieri* the courts are without power, by injunction or otherwise, to control the judgment and discretion

> of the officers of the land department in respect of the disposal of such lands under the public land laws.

The rule laid down in *United States* v. *Schurz* was approved by this Court in *Cameron* v. *United States*, 252 U. S. 450, at 460.

In the recent case of *Work* v. *Rives*, 267 U. S. 175, this Court held that the courts did not have power to review a decision of the Secretary of the Interior under Section 5 of the Dent Act, where such decision involved the construction of the statute, and the Court took occasion to refer to decisions limiting the power of the courts to review the discretionary action of the Secretary of the Interior under the Land Laws, in the following language, which appears at page 183:

> *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; *Alaska Smokeless Company* v. *Lane*, 250 U. S. 549; and *Hall* v. *Payne*, 254 U. S. 343, were all cases in which it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary. It was pointed out that a man-

damus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. These cases are supported by earlier authorities to the same effect. *United States ex rel. Tucker* v. *Seaman,* 17 How. 225; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register and Receiver,* 9 Wall. 575; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40. All rest upon the *Decatur Case.* (*Decatur* v. *Paulding,* 14 Peters, 497.)

III

UNDER THE DECISIONS OF THIS COURT AND THE LONG-ESTABLISHED RULES AND REGULATIONS OF THE LAND DEPARTMENT, THE FILING OF BRAFFET'S APPLICATION CREATED NO RIGHTS IN THE LAND

Coming now to the facts of this case, the record discloses that on February 4, 1918, the date on which Braffet filed his application in the Salt Lake City land office—

(*a*) Title to the tract in question had presumptively passed to the State of Utah upon the passage of the Act of January 4, 1896, admitting Utah to statehood and confirming the Act of July 16, 1894, making the school grant to the State, and the land had been segregated from the public domain subject to other disposition both in law and in fact and upon the records of the local land office;

(*b*) School lands had been withdrawn by the Land Department from any form of entry, with directions to local offices to hold applications to be

disposed of in the same manner as contests (Circular of Instructions, March 6, 1903, 32 L. D. 39); and

(*c*) The functions of the officers of the Salt Lake City land office had, on November 10, 1915, been suspended as to coal-land applications for lands included in school sections, and directions given to the local officers to receive and transmit to the General Land Office all applications to enter, based on alleged mineral character of the land, until further orders. These instructions remained in full force until June 13, 1918.

Therefore the filing of the application gave Braffet simply the status of a contestant of the claim of Utah, and he in no sense secured a vested interest in the land.

He certainly did not secure a preferred right of entry contingent upon the successful prosecution of the contest, such as is conferred expressly by statute upon contestants of homestead entries (Sec. 2, Act of May 14, 1880, c. 89, 21 Stat. 140, 141, as amended; see U. S. C., Title 43, Sec. 185), as his contest was not against an entry of that character. See *Hartman* v. *Warren,* 76 Fed. 157; *Howell* v. *Sappington,* 165 Fed. 944.

The school land grant to Utah operated *proprio vigore* as a conveyance and stands in lieu of a patent. The granting Act effects a segregation of the designated school land sections from the mass of public domain subject to other disposition, and this

segregation continues until the claim of the State under the statute is destroyed by proof that the land is not of the character specified in the grant, made in the course of orderly procedure in the Land Department, and the final notation of the action taken, rejecting the claim, on the records of the local land office.

Had the State sought to relinquish its claim to this section in order to perfect a right to select land in lieu thereof, proof would have been required before allowing such relinquishment, and until such proof was furnished and the result noted on the records of the local land office the original segregation would have continued in force.

In *Shepley* v. *Cowan,* 91 U. S. 330, Shepley and others claimed title to land under a patent from the State of Missouri, and based upon an approval of a selection made by the State under a certain grant. It appeared that, at the date of said selection and at date of its approval, the land was claimed by the village of Carondelet, as a part of its commons, assured to it by Act of Congress. It was years later determined, as a matter of fact, that the boundaries of said commons did *not* include this land. In holding the asserted title under the State grant and patent to be without lawful basis, this Court said, at page 336:

> The general rule of the land department is, and from the commencement of the government has been, to hold as excluded from

> sale or preemption lands which might, in the execution of the laws of Congress, fall within grants to others; and therefore, in this case, until it was decided by the final determination of the Secretary of the Interior or of the Supreme Court of the United States whether the northern line of the commons was that run, as alleged, by Soulard previous to 1800, or that retraced by Brown in 1834, the land between those lines, embracing the premises in controversy, was legally reserved from sale, and, consequently, from any selection by the State as part of its five hundred thousand acres granted by the act of Sept. 4, 1841.

It requires but a slight paraphrasing of the above statement of facts and controlling law to cover the instant case as follows:

> Until it was decided by the final determination of the Secretary of the Interior that the land within this school section did not pass to the State of Utah, under its school grant, because of its known mineral character at date of admission of the State of Utah, the land was legally withdrawn from sale, and, consequently, from purchase by Braffet under the coal land laws.

It is a well-settled rule in the Land Department that no application will be received, nor any rights recognized as initiated, by the tender of an application for a tract embraced in an entry of record, until

said entry has been canceled upon the records of the local office.

Walker v. *Snider,* 19 L. D. 467.
Stewart v. *Peterson,* 28 L. D. 515, 519.
Hiram M. Hamilton, 38 L. D. 597.

This is not an arbitrary regulation, but one that experience has demonstrated to be necessary to afford notice to the public that land which has been segregated *prima facie* from the public domain is restored thereto and is subject to appropriation. Such rule is designed to give equal opportunity to each citizen. The rule has been specifically applied to school land grants to the States.

Santa Fe Pac. R. R. Co. v. *California,* 34 L. D. 12.
Charles L. Ostenfeldt, 41 L. D. 265.

Likewise to every form of appropriation or segregation.

Calif. and Oregon Land Co. v. *Hulen and Hunnicutt,* 46 L. D. 55.
State of New Mexico v. *Weed,* 49 L. D. 580.

It has been held that failure of the Land Department to apply this rule was error at law. *Germania Iron Co.* v. *James,* 89 Fed. 811.

In the case of *Holt* v. *Murphy,* 207 U. S. 407, 414, this Court considered various decisions rendered by the Interior Department and quoted with full approval from the decision in *Stewart* v. *Peterson,* 28 L. D. 515, the following statement of law:

> In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office.

After discussing that rule, this Court further said (p. 415):

> Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

Under Section 2347, R. S., prior to the Coal Leasing Act, only "vacant coal lands of the United States not otherwise appropriated or reserved by competent authority" were subject to purchase. The school land grant to Utah was a reservation of the section from other disposition, even had the section not been in effect reserved under the above-mentioned rules and regulations of the Land Department made pursuant to law and recognized by the courts.

Therefore, under the rules and regulations of the Land Department Braffet by his application secured no other or greater right than that of a contestant of the title of the State. Until this contest had terminated in the course marked by the

rules and regulations, then in force, and in accordance with the established procedure in such cases, the land involving the proceedings was not subject to any form of entry nor to purchase by Braffet under his coal land application.

This condition created no obstacle to the full exercise of ownership by the United States:

> *Shepley* v. *Cowan, supra.*
> *Frisbie* v. *Whitney,* 76 U. S. (9 Wall.) 187.
> *The Yosemite Valley Case,* 82 U. S. (15 Wall.) 77.
> *Campbell* v. *Wade,* 132 U. S. 34, 37.
> *United States* v. *Morrison,* 240 U. S. 192.
> *United States* v. *Norton* (C. C. A. 5th), decided June 9, 1927 (not yet reported).
> *Alice M. Reason,* 36 L. D. 279, 280–1.
> *Instructions,* 40 L. D. 416–417.

Vacant lands are such as are absolutely free, unclaimed, and unoccupied. *Payne* v. *U. S. ex rel. Olson,* 50 App. D. C. 119, citing *Cosmos Exploration Co.* v. *Gray Eagle,* 112 Fed. 4, which was affirmed in 190 U. S. 301.

In *United States ex rel. Durnford* v. *Fall,* 285 Fed. 887, the court said (p. 888):

> It will be observed that the sole ground for cancellation of relator's entry, as stated by the Secretary, was that the land, at the time the entry was made, was not vacant public land of the United States. This is where we think the case turns.

Then, after quoting from Section 2347, R. S., and from the earlier case of *Payne* v. *Olson, supra,* the same court said (p. 889):

> In the present case, however, we are of the opinion that the oil entries, whether valid or void, amounted to sufficient occupancy of the land within the statute to exclude it from entry as coal land. The land being occupied we are not concerned in this proceeding with the validity of the oil entries or the legality of the assignments which were made.

In the *Durnford case* both the Department and the court held that the land did not fall within the class open to purchase under Section 2347, R. S., because it was not "vacant coal lands of the United States." That was because the land was occupied by persons under a placer mining claim. In the *Durnford case* physical occupancy removed the land from the category of public lands, and here the record claim of the State had the same effect.

IV

BRAFFET NEITHER DID, NOR LAWFULLY COULD, PRIOR TO THE PASSAGE OF THE COAL LEASING ACT, PERFORM THE ACTS PREREQUISITE TO THE ACQUISITION OF A VESTED RIGHT

Braffet had neither tendered nor paid the price required to complete his purchase of the land prior to the appropriation thereof by the Coal Leasing Act; neither could he have done so, as his contest was at the time of the passage of that Act still pending and undetermined. No vested right to the land prior to the passage of that Act could have been acquired by Braffet, except by actual entry and payment of the purchase money under Section 2347,

R. S., and it is conceded that Braffet has done neither. Mere filing of the application could not therefore intercept the operation of the Coal Leasing Act, and unless the claim was of the class expressly excepted by the Act it was necessarily extinguished.

Certainly there is no doctrine of relation whereby the determination of such contest in favor of the contestant relates back to the time of the filing of the application or the initiation of the contest, so as to limit the right of the United States acting as owner and proprietor of the land (assuming that title did not in fact pass to the State under the school-land grant) to appropriate the land to some other use or provide for some other form of disposition.

At the time of the school land grant the tract in controversy, as a matter of fact, was not known to be coal land, either by the officials of the State or by the officers of the Land Department. The record discloses that more than twenty years elapsed between the date of the grant and the date when Braffet filed his application and that during that period the State had treated the land as State school land, agricultural in character, to which it held full title, and had sold in due course for value. The Land Department had treated the land as of that character and as having passed to the State and had caused its records to so indicate. Braffet by filing his application to purchase merely challenged that record, and the only result of his ultimate success would have been to provide the grounds for an

entry cancelling the grant to Utah and designating the tract as "vacant coal land."

Only after such an entry had been made could the land become again subject to original application to purchase, and subject to applications upon equal terms by Braffet or by any other person qualifying as an applicant coming within the provisions of Section 2347, R. S.; but no such entry was made in view of the fact that in 1920, over two years before Braffet's appeal before the Secretary was decided and the case sent back for further proceedings, the Coal Leasing Act became law and the land was effectively appropriated to the purposes of the Act.

V

THE WITHDRAWAL OF THE STATE OF UTAH AFTER THE DECISION OF THE SECRETARY OF THE INTERIOR DID NOT HAVE THE EFFECT ATTRIBUTED TO IT BY THE COURT OF APPEALS

The Court of Appeals in its opinion referred to the established practice of the Land Department to the effect that where an application for the purchase of coal lands is made on school numbered sections, the applicant is given the status of a contestant with the burden on him to establish that the lands were well-known coal lands at the date of the grant, the State in each instance being the contestee.

It was further stated that while the courts would not feel inclined by extraordinary process to disturb the construction thus placed on the land law

and consistently adhered to by the Department for a long period of time "that rule has no application here, since the contestee, the State, after being given an opportunity to produce testimony to defeat Braffet's *prima facie* case, voluntarily withdrew from the contest, thus surrendering any rights it may have had thereunder as contestee." (R. 20.)

The court failed to take into account the important fact which appeared in the answer (Answer, Par. 10, R. 9) that the withdrawal of the State from the controversy was "without prejudice to the interests or rights of the intervener, the said Pleasant Valley Coal Company, for the reason, as therein set forth, that it had no beneficial interest in the land in controversy because on or about May 14, 1902, it had parted with its title by issuing its patent therefor to one Laura Bird."

It should further be noted that the act of withdrawal limited as above indicated took place after the decision of the Secretary in 1922, or more than two years after the passage of the Coal Leasing Act. Even had the withdrawal been unlimited, it could not operate retroactively so as to make the tract in question "vacant coal lands" at the time of filing Braffet's application in 1918, when the State was in good faith claiming title on behalf of itself and its grantees under the school-land grant.

VI

THE COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE PROVISIONS OF THE COAL LEASING ACT OF FEBRUARY 25, 1920

The Court of Appeals held (R. 21) that "the lease and the Leasing Act have nothing to do with this case." This holding was clearly erroneous and failed to recognize the status of the land in question either upon the date of the passage of the Coal Leasing Act or upon the date of the decision of the Secretary of the Interior, July 31, 1922.

Section 37 of the Coal Leasing Act (page 13, *supra*) excepted from its operation "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Unless, therefore, claims of the class asserted by Braffet came within the express exception above quoted, the tract here under consideration was on February 25, 1920, effectively appropriated to the purposes of the Act and withdrawn from purchase under Section 2347, Revised Statutes, thus cutting Braffet off from the right he might otherwise have had, upon final determination of his contest and making of the proper entry thereof in the local office, of making anew an application for the purchase of the tract as coal land.

In view of the decisions of the Land Department and of the courts to which we have referred above,

so long as the title to the tract was *sub judice* in the Department on Braffet's contest—that is, until a final determination—Braffet could not either complete his purchase under Section 2347, R. S., or secure vested rights to the land by any other kind of filing or entry, and his contest was clearly not a claim falling within the exception.

While Utah withdrew without prejudice to the right or title of those claiming as its grantees, the Coal Company, claiming as such grantee, did not withdraw until 1923, when its withdrawal was expressly conditioned on the grant to it by the Government of a valid lease under the Coal Leasing Act. (R. 10.) Its offer to waive its claim under the State grant was expressly conditioned on the grant of the lease, and such waiver was by way of compromise of a long pending controversy.

If the act of the Secretary of the Interior in effecting the compromise by granting the coal lease be deemed a final determination of Braffet's contest, such as might *otherwise* have operated to open the land to purchase under the Coal Land Laws, the Leasing Act had placed the land in a category no longer open to purchase, as the land was by that Act effectively "appropriated" and "reserved by competent authority" from sale to any person, and such appropriation and reservation became instantly operative upon determination that the title had not passed to the State of Utah.

Therefore it follows that there never existed any moment of time when this land was lawfully sub-

ject to Braffet's application to purchase under the Coal Land Law.

The decision of the Court of Appeals would compel the Secretary of the Interior to issue a patent to Braffet, conveying the fee title to this valuable tract in the teeth of the provisions of the Coal Leasing Act, thus, in effect, requiring the Secretary to perform an act which Congress has expressly prohibited, thereby nullifying the terms of the Coal Leasing Act under which the land has been leased by the Secretary to a third person, not a party to this suit.

The decision of *United States* v. *Morrison*, 240 U. S. 192, sustains the general principle that until actual vesting of title to public lands they remain subject to such disposal by Congress as may defeat an inchoate or possible claim.

The Court said, at page 212:

> Again, it is urged that the survey when approved related back to the date of the grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. The doctrine of rela-

tion can not be invoked to destroy this authority.

That same rule, applied in the instant case, would recognize the power of Congress to enact the Coal Leasing Act with its repeal of the prior coal land laws, subject only to previously vested rights thereunder. Under that rule it is clear that in 1922 when the claim of Utah under its school grant was rejected (in effect) the land had already, in 1920, been reserved by Congress from sale to any person. Hence it was not then open to purchase by Braffet.

VII

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PLEASANT VALLEY COAL COMPANY WAS NOT AN INDISPENSABLE PARTY

In its opinion the court said (R. 21):

> The coal company acquired no rights either through the State of Utah or through its lease that could in any way impair the right of Braffet acquired through the filing of his application to purchase.

As Braffet acquired no right except that of a contestant, the above finding becomes an erroneous premise upon which to base the holding of the court that the Coal Company is not an indispensable party hereto.

Again the court said (R. 21):

> The position here assumed by the Secretary and the coal company is highly incon-

> sistent, since as a condition precedent to the execution of any sort of a pretended lease the Secretary must have relied upon his finding that the lands were known coal lands on the date of the grant to the State, and upon the further admission of that fact by the coal company.

This statement of the court apparently does not encompass the fact that the Secretary also relied upon the lack of right in Braffet, the status of Braffet under the regulations of the Department, and the effect of the passage of the Coal Leasing Act in entirely cutting off his right to refile his application to purchase; nor the further fact that the lease to the Coal Company was made following the exercise of his official judgment and discretion in the determination of questions within his sole jurisdiction, viz, that the land was vacant coal land not subject to entry; that no valid claim thereto existed; that title thereto was in the United States; that it was subject to the provisions of the Act; and that the Coal Company was in a position to handle the tract under its lease of the adjacent lands in the interest of the United States, the owner. *Kirwin* v. *Murphy,* 189 U. S. 35.

With these conditions existing, why should not the Secretary have disposed of it to the Coal Company? It had equities therein, or at least apparent equities, arising from its attempt to purchase from the State of Utah in good faith and the payment

of taxes upon the land for a long period of years. (R. 10.)

These equities having been recognized by the modification of the Coal Company's already existing lease on adjacent lands, and the incorporation of these lands therein, the Coal Company has a substantial claim, as to which it has a right to be heard. The possibility of its defeat on grounds of error on the part of the Secretary is beside the question; the Coal Company holds a lease to the lands executed by the United States and in exchange for which it surrendered its claim to the fee title; it is in possession thereunder claiming all the rights vouchsafed by the Coal Leasing Act; its presence is necessary to an adjudication of the invalidity of its lease. Yet the lower court and the Court of Appeals, without affording opportunity to the Coal Company to say aye or nay, try the question, pronounce the lease void, and render judgment to that effect, with it absent from each court.

In *Brady* v. *Work*, 263 U. S. 435, the Court affirmed a decree dismissing a bill for injunction against the officers of the land office, seeking to enjoin them from issuing a patent to certain homestead lands on the ground of the absence of the party in whose favor the Department had decided, saying, at page 437:

> Lillie S. Harner is the person whom the administrative officers of the Government have held to be entitled to a patent for this

land. Clearly the controversy between the plaintiff and those officers involving the granting of a patent to her can not be settled without her presence in court. *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 578. She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party.

It is respectfully submitted that the position of the Coal Company in this suit is analogous to that of the successful applicant in *Work* v. *Brady,* and that the Coal Company was an indispensable party to this suit.

VIII

THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNITED STATES WAS NOT AN INDISPENSABLE PARTY

The land was segregated from the public domain by the school grant, and the *bona fide* claim of Utah thereto. Braffet, by the filing of his application to purchase, his contest flowing therefrom, the conclusion of the Secretary that he had made out a *prima facie* case against Utah's title, secured no vested rights in the land; consequently no title passed out of the United States, and under such a state of affairs it is entitled to defend its title against any apparent unlawful claim thereto. A judgment such as the decree here, in effect determining the invalidity of its title, and divesting it thereof without its presence, is wholly beyond the jurisdiction and

authority of the court. This being merely a case involving the action of the Secretary of the Interior, as in injunction or mandamus, is not one in which title may be settled or adjudicated. The sole question is the right of the court to require or restrain action by the Secretary of the Interior; it has ordered the execution of a patent to lands, title to which is apparently vested in the United States, with no color of right in Braffet, in his favor, after consideration and determination against the United States, in its absence, wholly ignoring the finding of the Secretary of the Interior, and the rules and regulations under which such finding was reached.

The United States claims ownership, also, of the lease to the Coal Company. Thereby a royalty is to be paid upon the coal mined from said tract. By the execution of a patent, the United States not only is divested of the fee in the land but likewise of its lease, for it is apparent the Government can not issue a patent containing reservations. The order of the court renders title to Braffet, and effectually conveys to him the right to royalties accruing under the lease, and the United States has been denied any right, independent of the Secretary of the Interior's right as against mandamus or injunction, to be heard, or to be present in the action.

IX

THE COURT OF APPEALS ERRED IN HOLDING THAT THERE WAS BASIS FOR THE EXERCISE OF EQUITABLE JURISDICTION, AS AN ADEQUATE REMEDY AT LAW EXISTED

This action was begun by the filing of a bill in equity, praying for the issuance by the court of a writ of mandatory injunction. No relief either is asked or granted which could not have been obtained and extended, if at all, through mandamus. The bill seeks no injunctive relief, prays wholly for mandatory relief, and the lower court granted no injunctive relief. (Decree, R. 14.) Here is the prayer (R. 5):

> Wherefore plaintiff prays that a writ of subpœna issue directed to said Secretary defendant, requiring him to appear herein and answer the exigencies of this bill of complaint; that a mandatory injunction issue against the defendant Secretary, directing that the decision of the Department of the Interior of July 31, 1922, be vacated and that the prior said decision of the Commissioner of the General Land Office be affirmed in all respects, and that it be further adjudicated and decreed that the said application of plaintiff was valid, and that he be permitted by the defendant Secretary to complete his purchase of said lands in the manner provided by law, and thereupon that a patent shall issue to plaintiff therefor. That plaintiff may have such other and further relief as may be just and equitable.

The Court of Appeals concluded that only the ministerial act of issuing to Braffet a patent remained to be done by the Secretary, and ordered it. It also held that in its decree the lower court had exceeded its authority in an immaterial particular which it ordered corrected by a modification; but that does not affect the fact that, when the bill of complaint was filed, if plaintiff was entitled to any relief he could have obtained it through mandamus. Equity, therefore, has no jurisdiction.

CONCLUSION

The decision of the Court of Appeals is in direct conflict with the rules and practice of the Department of the Interior which have been in effect for more than 40 years; this practice has been uniformly recognized by this Court whenever it has come within its purview, as a wise and equitable regulation. To permit this decision to stand will so affect the policy and procedure of the Department as to completely revolutionize its future attitude in such cases, and it should have the serious consideration of this Court. The other questions of error to be raised for consideration, while not of the same outstanding importance to the Department and to future public land claimants, are so closely interrelated to the public rights of the United States as the owner and lessor of coal and other public mineral lands as to require their proper

disposition, particularly as related to the lands covered by school grants to the various States.

WILLIAM D. MITCHELL,
Solicitor General.

E. O. PATTERSON,
Solicitor, Interior Department.

O. H. GRAVES,
Assistant to the Solicitor.

JUNE, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 344

HUBERT WORK, AS SECRETARY OF THE INTERIOR, petitioner

v.

ROBERT I. BRAFFET, ADMINISTRATOR OF THE ESTATE of Mark P. Braffet, deceased

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 17) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1927. (R. 23.) Petition for certiorari was filed July 1, 1927, and granted October 24, 1927. (R. 25.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

Under an Act allowing purchase of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, Braffet filed with the Interior Department an application to purchase as coal land a school section which he claimed had not passed under the school grant to Utah, because known to be coal land at the time of the grant.

Under rules of the Interior Department the land was treated as having been withdrawn from entry by the State grant, and his application was treated as a contest of the State's title. While the contest remained pending and undecided, the leasing Act was passed, providing that coal lands should only be disposed of by lease.

The principal question is whether Braffet had acquired an interest which could not be and was not extinguished by the leasing Act.

If this question is resolved against the petitioner, a question then arises whether, as the Department of the Interior has never decided the question whether the lands were known mineral at the time of the State grant, but refused to proceed with the contest initiated as above stated, on the assumption that the coal leasing Act removed the necessity of deciding the contest, Braffet was entitled to a patent, or anything more than to have his contest reopened and determined by the Secretary of the Interior.

THE STATUTES

Section 2347, R. S. (see U. S. C., Title 30, Sec. 71), provides:

> Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Section 2351, R. S. (see U. S. C., Title 30, Sec. 75), provides:

> * * * The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

The Act of February 25, 1920, c. 85, 41 Stat. 437, 438, 451 (see U. S. C., Title 30, Secs. 181, 201, 193), contains the following provisions:

> SEC. 1. That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands con-

taining such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities * * *.

SEC. 2. That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by

competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided,* That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: * * * *And provided further,* That no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: * * *.

* * * * *

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal-mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

Rule 1 of the Regulations of March 6, 1903 (32 Land Dec. 39), issued by the Secretary of the Interior, is as follows:

> RULE 1. When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public-land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases.

STATEMENT

This action was instituted June 12, 1924, by the respondent's intestate in the Supreme Court of the District of Columbia to obtain a mandatory injunction directing the Secretary of the Interior to vacate a decision rendered by him on July 31, 1922, and to compel him to issue a patent to a quarter section of land in Carbon County, in the State of Utah. (R. 5.) The case was submitted on bill and answer. (R. 14.) The facts are those admitted in or alleged by the answer.

The tract in question is SE ¼ of Section 32, township 12 S., range 10 E., S. L. M., Salt Lake City land district. The tract was included in the school-land grant to the State of Utah under the Enabling

Act of July 16, 1894 (c. 138, 28 Stat. 107, 109), granting to Utah sections 2, 16, 32, and 36 in every township of the proposed State. The grant became effective, by its terms, on the admission of the State to the Union, which took place January 4, 1896. This grant has been construed not to include mineral lands known to be such at the time the grant took effect. *United States* v. *Street*, 245 U. S. 563.

The official Government survey had returned this tract as nonmineral, the survey having been made prior to the admission of Utah into the Union. (R. 6.)

Continuously following the grant, Utah claimed this tract under it, and in May, 1902, in due course, sold it for value to one Laura Bird, who thereafter conveyed it to the Pleasant Valley Coal Company, which company continued, until this controversy arose, to be the record owner and paid the taxes thereon. (R. 10.)

On March 6, 1903, the Circular of Instructions above mentioned was issued by the Department of the Interior, which provided that when a school section is identified by a Government survey and no claim under the public land laws exists at the time when the right of the State would attach the presumption arises that the title has passed to the State and that applications for purchase under the mining laws covering parts of school sections "will be disposed of in the same manner as other contest cases." (32 Land Dec. 39.)

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On November 10, 1915, the Secretary of the Interior suspended the functions of the local land officers at the Salt Lake City land office as to coal-land applications for lands included in school sections, and directed the said officers to receive and transmit to the General Land Office all applications to enter, based on the alleged mineral character of land, and such instructions were in full force and effect to and including June 13, 1918. (R. 6.)

On February 4, 1918, Mark P. Braffet, of whose estate the respondent is administrator, filed in the local land office at Salt Lake City his application to purchase the above-described tract as coal land. (R. 6.) Braffet from 1902 to 1917 was attorney for the Pleasant Valley Coal Company, and evidently made use of information so obtained that the lands are in fact coal lands, as a basis for his application. (R. 7.) His application to purchase was treated as a contest of Utah's title, under the rules and regulations of the General Land Office, and on July 25, 1918, citation was issued to the State of Utah in accordance with the rule of the General Land Office as to contests. (R. 8.)

On August 13, 1918, the State answered, alleging that they were not known coal lands on the date of the grant. The Coal Company intervened with a like allegation. Braffet assumed the burden of his contest and introduced evidence in support of his claim at a hearing before the local land officers. At the conclusion of Braffet's case the State and the Coal Company made a motion to dismiss, in the na-

ture of a demurrer to the evidence, which motion was sustained by the local land officers without hearing any testimony in behalf of the State's claim. (R. 7, 8, 9.)

Braffet appealed to the Commissioner of the General Land Office, who, on February 28, 1921, reversed the judgment of the local land office, but, instead of remanding the case to hear evidence for the State, directed that the State's protest be dismissed. (R. 9.)

The State and the Coal Company appealed to the Secretary of the Interior, who, on July 31, 1922, held that the local officers erred in dismissing the contest of Braffet on the ground of the insufficiency of his evidence, and that the Commissioner of the General Land Office had also erred in disposing of the case without affording the State and the Coal Company an opportunity to submit evidence. He held that Braffet's coal application made him a mere contestant, and remanded the case to the local office to proceed with the contest by hearing further testimony. He also directed that the Government should formally intervene and be represented by an officer of the field service, and in the event that the contestant did not proceed with the contest it be prosecuted by the Government. (49 Land Dec. 212.)

The Secretary has never determined that this tract was known coal land at the time of the grant. In his answer the Secretary did not admit or deny that the land was in fact known coal land in 1896,

alleging that the question as to the known character of the land at the time of the grant has never been finally determined by the Land Department. (R. 11.)

In the meantime, while the proceedings above described were pending, and the question as to the nonmineral character of the land at the time of the grant awaited decision in the Department, Congress passed the leasing Act of February 25, 1920.

The Department of the Interior and the Coal Company thereupon proceeded on the assumption that the institution by Braffet of what amounted to a contest under the Department regulations gave him no right which prevented Congress from withdrawing the land from entry, and that the effect of the leasing Act was to end the necessity of proceeding with the contest. The Coal Company, for the purpose of ending the controversy and litigation between it and the United States, offered to waive its claim under the State grant and to take a coal lease from the United States, expressly stipulating that its waiver was on condition that the lease be granted. The Coal Company had obtained a lease of other lands under the leasing Act on August 3, 1921, and on June 4, 1923, that lease was modified by including in its operation the tract here involved. (R. 10, 11.) That lease provided for the payment of royalties to the United States, with an obligation to mine a minimum tonnage per annum and develop the premises. (R. 11.)

Evidently to make way for this arrangement, on December 28, 1922, the State of Utah executed a withdrawal of its protest against Braffet's application to purchase—

> without prejudice to the interests or rights of the intervener, the said Pleasant Valley Coal Company, for the reason, as therein set forth, that it had no beneficial interest in the land in controversy because on or about May 14, 1902, it had parted with its title by issuing its patent therefor to one Laura Bird. (R. 10.)

On or about March 14, 1924, Braffet filed in the Department a petition to reopen his contest, which "was denied on March 24, 1924." (R. 12.) Thereupon Braffet brought this suit.

The Supreme Court of the District entered a decree ordering the Secretary to vacate the decision of July 31, 1922, in which he had held that Braffet had made a prima facie case before the local land officers and in which he had ordered that proceeding remanded to the local land office for further testimony, and also directing the Secretary to issue Braffet a patent upon his paying the purchase price. (R. 15.)

The Secretary took an appeal to the Court of Appeals of the District, which substituted Braffet's administrator and modified the judgment of the Supreme Court of the District, and held, notwithstanding the regulations and established rules of the Land Office, that these lands were vacant coal lands

open to purchase by Braffet, and, notwithstanding they had presumably passed to the State under its grant and disregarding the established rule of the Department that such an application amounts only to a contest of the State's right, held that Braffet acquired by his application a right to purchase which was not and could not be divested by the leasing Act.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in entering judgment directing the Secretary of the Interior to issue to Braffet a patent.

2. The Court of Appeals erred in holding that Braffet, by his application for purchase, acquired a right which prevented the United States, by subsequent legislation in the form of the leasing Act, from otherwise disposing of the coal land, and in holding that the coal leasing Act did not operate to end the necessity of proceeding with his contest.

3. The Court of Appeals erred in disregarding the regulations and established practice and decisions of the Land Department, to the effect that an application for purchase of school lands amounts only to the institution of a contest giving the applicant no right to compel the United States to sell him the land and to refrain from otherwise disposing of it.

4. The Court of Appeals erred in holding that the Department of the Interior had ever determined that the land was known coal land at the time of the State grant, and erred in holding that Braffet

had, in any event, more than a right to proceed with his contest.

SUMMARY OF ARGUMENT

The filing of the application to purchase gave Braffet merely the status of a contestant of the claim of Utah. The regulations and decisions of the Land Department provided that school lands were withdrawn from any form of entry and applications for their purchase were to be considered as contests and dealt with as such. These regulations were valid. The school land grant to Utah and the fact that the survey showed the lands to be non-mineral had the effect of withdrawing them from sale, and they were no longer vacant coal lands "not otherwise appropriated or reserved by competent authority" within the meaning of Section 2347 of the Revised Statutes.

Treating Braffet's application for purchase as the initiation of a contest, he acquired thereby no right to the land which could not be terminated by the leasing Act. The leasing Act, passed while his contest was pending and undecided, withdrew coal lands from purchase and allowed their disposition only under the leasing Act. Braffet did not have a valid claim in existence at the time of the passage of the Act such as was meant by the exception in Section 37.

If his contest had been successful he would have had no preference right to then enter or purchase the land.

If the above contentions are rejected, and Braffet is held to have a right unaffected by the leasing Act, he is not entitled to a patent, but only to have the contest reopened and the question whether the lands were known coal lands at the time of the State grant considered and decided in the Department of the Interior, and such relief he has not sought in this suit.

The Coal Company surrendered its claim under the State grant on condition that it obtain a lease, and on the assumption that Braffet's right to contest was terminated by the leasing Act. If the leasing Act did not put an end to the contest, the Coal Company is equitably entitled to be restored to the position it was in before the lease was made, and Braffet is not entitled to be placed in a better position than if his contest had been proceeded with.

ARGUMENT

I

UNDER THE DECISIONS OF THIS COURT AND THE LONG-ESTABLISHED RULES OF THE LAND DEPARTMENT, THE FILING OF THE BRAFFET APPLICATION CREATED NO RIGHT IN THE LAND WHICH PREVENTED ITS DISPOSITION BY CONGRESS

The title to the tract in question had presumptively passed to the State on January 4, 1896, the date of the admission of the State of Utah to the Union.

By the Circular of March 6, 1903 (32 Land Dec. 39), school lands had been withdrawn by the Land

Department from any form of entry, with directions to local offices to hold applications to be disposed of in the same manner as contests. The respondent contends that these regulations applied only to indemnity lands. While the preamble does refer to indemnity lands, Rule 1 (above quoted) expressly relates to school sections. The respondent claims that on January 10, 1906 (34 Land. Dec. 365, 369), the rule of 1903 was abolished and a new rule established, reading as follows:

> Claims of parties based upon mineral locations covering parts of a school section, asserting that same were known to be chiefly valuable for their mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patents under the mining laws are presented.

There was no express repeal of Rule 1 of 1903, and the Department has uniformly held since 1906 that Rule 1 of 1903 is in effect. It has also held that Rule 1 relates to school sections as well as indemnity lands.

> *Charles L. Ostenfeldt,* 41 L. D. 265.
> *Santa Fe Pacific R. R. Co.* v. *California,* 34 L. D. 12.

It has long been settled in the Land Department that no application will be received, nor any rights recognized as initiated, by the tender of an application for a tract embraced in an entry of record until the entry has been canceled on the records of the local office.

Walker v. *Snider,* 19 L. D. 467.
Stewart v. *Peterson,* 28 L. D. 515, 519.
Hiram M. Hamilton, 38 L. D. 597.

In *Shepley* v. *Cowan,* 91 U. S. 330, Shepley and others claimed title to land under a patent from the State of Missouri, and based upon an approval of a selection made by the State under a certain grant. It appeared that, at the date of said selection and at date of its approval, the land was claimed by the village of Carondelet, as a part of its commons, assured to it by Act of Congress. It was years later determined, as a matter of fact, that the boundaries of said commons did *not* include this land. In holding the asserted title under the State grant and patent to be without lawful basis, this Court said, at page 336:

> The general rule of the land department is, and from the commencement of the government has been, to hold as excluded from sale or preemption lands which might, in the execution of the laws of Congress, fall within grants to others; and therefore, in this case, until it was decided by the final determination of the Secretary of the Interior or of the Supreme Court of the United States whether the northern line of the commons was that run, as alleged, by Soulard previous to 1800, or that retraced by Brown in 1834, the land between those lines, embracing the premises in controversy, was legally reserved from sale, and, consequently, from any selection by the State as part of its five hundred

thousand acres granted by the act of Sept. 4, 1841.

In *Holt* v. *Murphy,* 207 U. S. 407, 414, the Court quoted with approval from the decision in *Stewart* v. *Peterson,* 28 L. D. 515, as follows:

> In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office.

After discussing that rule, this Court further said (p. 415):

> Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

Under Section 2347, R. S., prior to the coal leasing Act, only "vacant coal lands of the United States not otherwise appropriated or reserved by competent authority" were subject to purchase. The school land grant to Utah was a reservation of the section from other disposition, even had the section not in effect been reserved under the above-mentioned rules and regulations of the Land Department made pursuant to law and recognized by

the courts. Braffet, therefore, by his application secured no other or greater right than that of a contestant of the title of the State. His application amounted to nothing more than an effort by contest to restore the land to entry. Until the contest had terminated in the course marked by the rules and regulations then in force the land was not subject to any form of entry nor to purchase by Braffet under his coal land application.

This condition created no obstacle to the full exercise of ownership by the United States.

Shepley v. *Cowan, supra.*
Frisbie v. *Whitney,* 9 Wall. 187.
The Yosemite Valley Case, 15 Wall. 77.
Campbell v. *Wade,* 132 U. S. 34, 37.
United States v. *Morrison,* 240 U. S. 192.
United States v. *Norton* (C. C. A. 5th), 19 F. (2d) 836.
Alice M. Reason, 36 L. D. 279, 280–1.
Instructions, 40 L. D. 415, 416, 417.

Vacant lands are such as are absolutely free, unclaimed, and unoccupied. *Payne* v. *U. S. ex rel. Olson,* 50 App. D. C. 119, citing *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.,* 112 Fed. 4, which was affirmed in 190 U. S. 301.

At the time of the passage of the leasing Act the Braffet contest was pending and undecided. The local land officers had dismissed his contest on what amounted to a demurrer to his evidence. On his appeal the Commissioner of the General Land Of-

fice held that he had made out a prima facie case, but, ignoring the fact that the State and the Coal Company had never been heard or introduced evidence, he determined the issue on the merits in Braffet's favor. On appeal of the Coal Company and the State, the Secretary of the Interior corrected this error, and, agreeing with the Commissioner that Braffet had made a prima facie case, recognized the fact that the State and the Coal Company had never introduced evidence or rested their case, and remanded the contest in order that it might be proceeded with and the State and the Coal Company might introduce evidence. It was under these conditions that the leasing Act was passed.

If given the effect we contend for, it made further proceedings in the contest useless, because if Braffet's contest had been successful he would not have been allowed to purchase the land, as only a lease could have been given, and as to that the Coal Company had an equitable right to preference under Section 2 of the Leasing Act, having claimed the land and paid taxes on it for twenty years.

That Congress had the right in 1920 to withdraw the land from sale so far as Braffet was concerned is clear, but he contends that the leasing Act saved "valid existing claims," and that his claim was such within the meaning of the statute. The case of *Stockley* v. *United States,* 260 U. S. 532, which respondent cites, dealt with some words in

an Executive-withdrawal order and did not decide their effect, but suggested a possible construction. There is no reason to suppose that Congress intended by this saving clause in the leasing Act to give to contestants in pending undecided contests, initiated merely to restore withdrawn lands to entry, the right to proceed with the contest merely for the purpose of opening the way to entry by the general public.

If Braffet's contest had been successful he would have had no preferred right to entry or purchase. A published proclamation would have been necessary to restore the land to entry, to give equal rights to the general public. Preference rights have been expressly conferred by statute upon contestants of homestead entries (Section 2, Act of May 14, 1880, c. 89, 21 Stat. 140, 141, as amended; see U. S. C. Title 43, Section 185), but Braffet's contest was not against an entry of that character. *Hartman* v. *Warren*, 76 Fed. 157; *Howell* v. *Sappington*, 165 Fed. 944. In the absence of a statute or regulation of the Interior Department no preference right exists. There was no such statute or regulation, and the Land Department has consistently held that no preference right exists under these circumstances. See *Charles L. Ostenfeldt*, 41 L. D. 265, 267, where it was said:

> No rights were obtained by Ostenfeldt when he tendered his application to purchase, December 13, 1909, he occupying merely the status of a would-be contestant, without the

privilege, sometimes extended by statute, of a preference right of entry in event of success.

In *Utah* v. *Olson,* 47 L. D. 58, decided February 27, 1919, before the passage of the leasing Act, it was held that one who successfully contested the prima facie claim of the State of Utah to a tract in a school section upon the ground of the known coal character of the land at the date of the school land grant gains thereby no preference right to make coal entry for the tract involved.

It seems idle to argue that any such nebulous hope of being able to acquire this land in competition with the general public after a successful contest was intended to be saved by Section 37 of the leasing Act. Since Braffet had no preference right the effect of the saving clause, as construed by the respondent, would have been to protect not a special right of the contestant, but the general and equal opportunity of the public to make application for purchase. The policy of Congress was to prevent sale of valuable coal and oil deposits and to limit the public to obtaining leases returning reasonable royalties to the United States. To preserve to the general public opportunity to purchase such lands because of a pending contest like this one would be contrary to the purpose of the Act.

Respondent argues that the exception in Section 37 of "valid claims" means claims less than vested rights, as those would have been saved by the Constitution. This overlooks the practice of Congress

to insert in legislation provisions saving vested rights, so as to avoid the appearance of attempting to destroy them and to relieve the courts of the necessity of holding the legislation invalid as to such rights, but intended to be operative in other respects. Furthermore, the exception by its reference to valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws including discovery," shows that it was not intended to save the right to continue contest proceedings in the Department but that the clause related to physical development and compliance with other conditions leading up to discovery under the laws relating to mining claims. Similar language is found in other statutes. Act of August 24, 1912, c. 369, 37 Stat. 497.

Finally, the Congressional record establishes that this exception dealt with claims which up to the passage of the leasing Act had been asserted under the mining laws, by location, possession, and development, which if continued to discovery would entitle the claimant to a patent. Cong. Rec., Vol. 58, Part 5, pages 4577–4585, 66th Cong., 1st Session.

II

IF THE LEASING ACT DID NOT ELIMINATE BRAFFET, HE WAS NOT ENTITLED TO A PATENT BUT ONLY TO CONTINUE HIS CONTEST, AND THAT RELIEF HE HAS NOT ASKED IN THIS SUIT

The respondent contends and the Court of Appeals held that the action of the Coal Company in

relinquishing its claim under the State grant in exchange for a lease, and the act of the Secretary of the Interior in making the lease, operate as an admission and decision that the land was known coal land at the date of the State grant and did not pass under it, and if the State's title therefore fails and the leasing Act did not end Braffet's right, he was entitled to a patent on the theory that the contest in the Department has been decided.

This argument overlooks several considerations. The respondent has resorted to a court of equity, which will not perpetrate an injustice. The Coal Company was insisting on its title under the State. It is evident that the Department of the Interior and the Coal Company in giving and accepting the lease under the leasing Act assumed, as they had a right to assume, that under the established regulations of the Interior Department, Braffet's application was a mere contest which gave him no right, and they concluded that the leasing Act had removed him from consideration. Under those conditions and on that assumption, and to avoid further litigation and expense, the Coal Company agreed to surrender its claim under the State grant in consideration of being given a lease. This action did not amount to a decision on the question whether the land had in fact passed under the State grant. If the regulations of the Department are to be overturned or it is to be held that the Department and the Coal Company were mistaken

as to the effect of the leasing Act, equity requires that the Coal Company be restored to as good position as it was in before the lease was made, and that Braffet be placed in no better position than if the contest had proceeded as he claims it should. The Coal Company surrendered its claim on condition that it receive a valid and effective lease. As between it and the United States, if the lease is ineffective, it is entitled to renew its claim under the State's grant. Furthermore, the United States has an interest in this contest, and if it were proceeded with and determined that the land was not known coal land in 1896 and passed under the State grant, that would eliminate Braffet and leave the United States and the Coal Company where they are to-day, as the relinquishment by the Coal Company and the acceptance of a lease by it would remain in effect.

The question as to the known character of these lands at the time of the State grant is one to be primarily decided in the Department of the Interior and not in the courts.

> *Steel* v. *Smelting Company,* 106 U. S. 447, 450.
>
> *United States* v. *Schurz,* 102 U. S. 378, 395.
>
> *Plested* v. *Abbey,* 228 U. S. 42, 51.
>
> *Cameron* v. *United States,* 252 U. S. 450, 460.

If the leasing Act did not eliminate Braffet, the most he was entitled to was to have the contest proceeded with, and the only relief he would be

entitled to in court would be a writ of mandamus to compel the Secretary of the Interior to continue the hearing of the contest and to determine it in due course. That relief Braffet has not demanded in his bill of complaint.

CONCLUSION

It is respectfully submitted that the judgments of the courts below should be reversed and the case remanded to the Supreme Court of the District of Columbia with instructions to dismiss the bill.

WILLIAM D. MITCHELL,
Solicitor General.
E. O. PATTERSON,
Solicitor, Department of the Interior.
O. H. GRAVES,
Assistant to the Solicitor.

MARCH, 1928.

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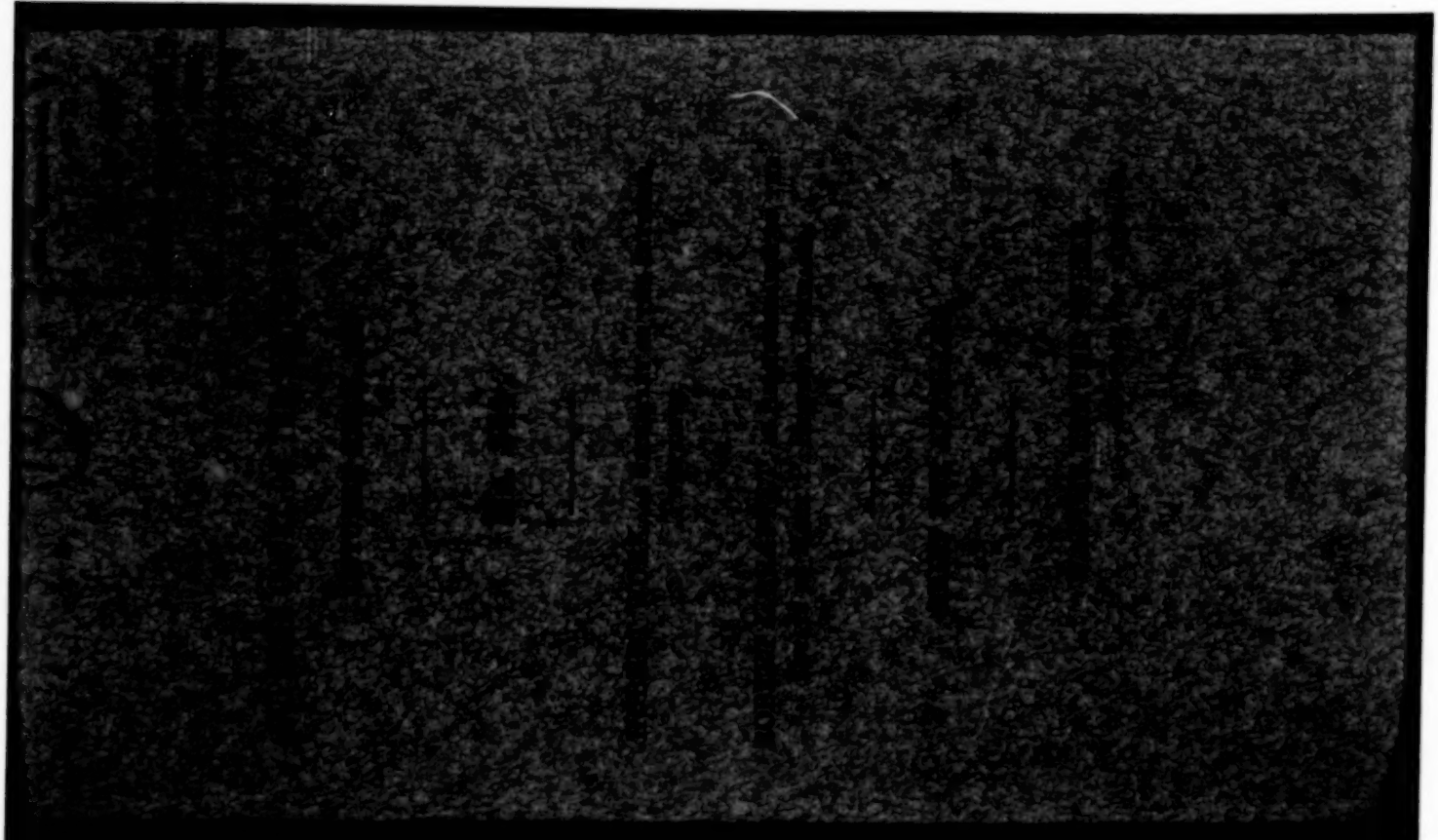

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 344

HUBERT WORK, AS SECRETARY OF THE INTERIOR, PETITIONER,

vs.

ROBERT I. BRAFFET, AS ADMINISTRATOR OF THE ESTATE OF MARK P. BRAFFET, DECEASED, APPELLEE.

BRIEF FOR APPELLEE.

Statement.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above-named appellee respectfully submits the matter following for his answer to appellant's application for *certiorari* herein. Its length is necessitated

by reason of the many wholly erroneous propositions submitted by the appellant.

In view of the recital of facts in the decision of the learned Court of Appeals (R., 17), but slight further statement will be necessary. In the bill it was alleged that Braffet applied to purchase, pursuant to Section 2347, Revised Statutes, known coal lands, and *known as such* on date of admission of Utah into the Union, not otherwise appropriated or reserved under the laws of the United States, etc. (par. 3 of bill, R., p. 2).

The allegation that the land was known coal land, and known as such on admission day, was not denied and stands fully admitted, the defendant, appellant, simply contending that it was not vacant coal land by reason (Answer, par. 12, R., p. 7), *arguendo*, it had been returned as nonmineral by the surveyor, and therefore presumably had passed to Utah under its school land grant, notwithstanding mineral land was excepted from the operation of the grant. That was the only issue in the case, *i. e.*, the appellant contending that the illegal claim of Utah was an entry of record in the local land office and, until it was canceled on the records of the local land office, the operation of the statute, Section 2347, Revised Statutes, was suspended by the regulations of the land office, and the right by a competent person to purchase coal lands, *i. e.*, mineral school sections, thereunder was precluded.

"*Known as such on date of admission of Utah* into the Union" is our basic allegation, one necessary to the maintenance of our suit. Therefore we submit that

the admission carries our suit, so far as any contention of appellant is concerned, that the land was not known coal land on admission day and is wholly in line with appellant's decision in *Braffet vs. Utah*, 49 L. D., 212.

> *"From a careful consideration of the evidence, the Department finds that the coal applicant has established prima facie that the land was known coal land on January 4, 1896; that the Commissioner's finding in this respect was correct; and that the Register and Receiver erred in sustaining a motion to dismiss."*

The defense was based on an erroneous construction of the first paragraph of Rule 1 of the school land indemnity selections regulations of the Adjustment Act of February 28, 1891, c. 384, 26 Stat., 796, as herein detailed.

The motion to dismiss was made by Utah and the coal company at conclusion of Braffet's case in the local land office, he taking the affirmative, as required by the appellant's rules, set out in *In re* Utah, 32 L. D., 117. The appellant in his answer made his decision part of his answer, and it is from that decision we gather the facts herein stated, and in which decision his erroneous construction of an extinct and canceled rule of "contest" is fully set forth (R., 9).

Here the appellant presents for the *first* time the proposition that since the application of Braffet had not ripened into a legal title at the time of the enacting of the coal-leasing act (Act of February 25, 1920, c. 85, Sections 1, 2, and 37, 41 Stat., 437), that the right of Braffet to complete his purchase and to proceed to

patent was cut out. The subject was not assigned as error below or set up in the answer (R., 15).

ARGUMENT.

All the alleged errors of the court of appeals and of the trial court are based on a fundamental error of the appellant, commencing when he filed his answer and stubbornly asserted ever since, and which he does not even attempt to explain away here. Every assigned and unassigned error, except question of necessary parties, and every argument attending either is based on the bald assertion that at the time of the Braffet application there existed a "rule of contest" provided for in Rule 1 of the regulations of March 6, 1903 (32 L. D., 39), reading as follows:

> "Applications presented under the mining law covering parts of a school section will be disposed in the same manner as other contest cases" (Ans., par. 6; R., p. 8).

From this isolated paragraph he built up his *every* defense, except lack of parties, and it is the only alleged rule or regulation of the department acted upon by him in the defense of his rulings of law that caused Braffet's application to be held *invalid* by him, although he determined that Braffet in the land office proceeding had established the mineral quality of the land.

On January 10, 1906 (34 L. D., 365), the above relied-on rule was abolished, the cited language *stricken out*, and in lieu thereof the following language was inserted (Rule 16):

> "Claims of parties based on mineral locations covering part of a school section, asserting that the same were known to be chiefly valuable for their mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patent under the mining laws are presented." (*Not as other contests.*)

That was the rule in force at the time of Braffet's application, not pleaded or relied on by the appellant, but, as a matter of fact and law, neither set of regulations could have been applied to the situation at the time of Braffet's application, since they were restricted and only applicable in the adjustment of claims by a State against the *United States* in the administration of the adjustment act of February 28, 1891 (25 Stat., 796; extended to *Utah*) arising under indemnity selection applications made by a State in lieu of lost mineral lands.

This is obvious and clear, as will be seen by a reading of the respective enacting clauses of the regulations.

The first enacting clause reads (32 L. D., 39):

> "The following rules and regulations will be observed in the adjustment of the grants to the several States and Territories made in support of common schools where the mineral or nonmineral character of the lands sought *to be* selected as *indemnity* or there made the *base* for an indemnity selection, is involved."

The enacting clause of the subsequent regulations (34 L. D., 365), reads as follows:

> "The following rules and regulations governing the selection of indemnity school lands are prescribed for the purpose of preserving a uniform method in all the States and Territories having a grant of lands for common school prior to the passage of the Act of February 28, 1891 (26 Stat., 796), *including the State of Utah*, to which the indemnity provisions of said Act were made applicable by the Act of May 3, 1902 (32 Stat., 188)."

It will be noted that the pleader in presenting in his answer the rule of contest (Ans., par. 6, R., p. 8) interpolated parenthetically (upon notice to all persons interested, *as in other contest cases*); while he had no right so to do, we wish to note that he did so.

It is an interesting and curious thing—probably the neglect or oversight of the pleader—that not since the filing of the answer has the appellant alluded to the enacting clauses, and when he set up the eliminated rule in his answer, he made no reference to the enacting clause of the regulations of March 6, 1903, but cited it as a *general* rule of practice relating to the administration of the school land grants and not one *restricted to the proof to be made by the State* when it applied for an indemnity section in lieu of one lost by the mineral exception of the school land grant, in the assertion of a claim against the United States.

We should be content on the above statement to submit our opposition here to the application for certiorari, but in an abundance of caution, in the interest of our client, we will proceed a bit further, noting briefly the many errors of the appellant.

1. He disregards entirely the decision of this Court in Sweet *vs.* United States, 245 U. S., 563. In fact, the decision is not mentioned in appellant's brief.

In fact, it is not disputed, as asserted by the court of appeals, that since the Sweet decision there was neither legal, equitable, presumptive or any other kind of title in Utah (R., p. 19), and if there was not, surely then Braffet was not precluded from making his application, nor was the operation of the statute, Sec. 2347 R. S., suspended by an eliminated rule of a regulation that has no application to the subject-matter.

Assuming or conceding that the first paragraph of rule 1 of the regulations of March 6, 1903, was in force on the date of Braffet's application (as it is identical with the first paragraph of rule 16 of the regulation of January 10, 1906), we submit these things are obvious.

The first paragraph of both regulations reads: "Where a school section has been identified by a Government survey, and no claim is, at the date when the right of the State would attach, if at all, asserted thereto under the *mining* laws or public land laws; the presumption arises that the title to the land has passed to the State; but this presumption may be overcome by submission of a satisfactory showing to the contrary."—Ans., par. 6, R., p. 8.

(*a*) We submit that the paragraph was applicable only in the adjustment of claims by Utah against the United States in the matter of indemnity selections made possible by the said Act of February 28, 1891,

which provided compensation to the State for lost mineral school sections.

(*b*) that when the State presented an application for indemnity selection and upon a base therefor, a school section, claiming it was mineral in character, but had been returned by the surveyor as nonmineral, or even if it was returned as mineral, the presumption would be that the land was of the character contemplated by the grant, and that the land had passed to the State, and the application would be rejected unless the State overcame the presumption by a showing to the contrary.

(*c*) Including the enacting clauses in the consideration of the subject, we submit no other construction is possible, and the department has ever so held since the regulation was first enacted and up to the time of the Braffet decision.

Re Oregon, 32 L. D., 105; *Re* Mahogany, 33 L. D., 37; *Re* Utah, 32 L. D., 117; and Utah *vs.* Allen, 27 L. D., 53; Bond *vs.* California, 31 L. D., 34; Dakota *vs.* Trinity, 34 L. D., 485; Dakota *vs.* Walsh, 34 L. D., 723; Dakota *vs.* Delicate, 34 L. D., 717; *Re* California, 34 L. D., 245 (construing regulation); *Re* California, 22 L. D., 294; *Re* California, *id.*, 402; Mining Regulations of March 29, 1909, 37 L. D., 728; Lindley (3d ed.), Section 336.

Conceding that the second paragraph of rule 16 of the second set of regulations was in force at the time

of Braffet's regulation, it will be noted it was not set up in the answer nor is it presented here. Its meaning is too clear to permit the appellant to urge it as a base for his present alleged rule of contest. It simply meant that if the *mining locator* on part of a school section applied for patent and the State protested the application under the indemnity selection adjustment act, the protest would be disposed of under the mining law.

The mining regulations under the mining law specifically provides what would follow the protest of Utah, or of anyone, against the granting of a mining patent (Allen *vs.* Utah, 27 L. D., 53).

If the application for patent covered part of a school section, the applicant would have to show to the satisfaction of the land officers that there had been a discovery of minerals sufficient to justify a man of ordinary prudence to proceed in his exploration, and that such exploration resulted in the development of mineral in commercial quantities, and that such discovery was made prior to the time when the right of the State attached to the land—*i. e.*, the date of the approved survey (Lindley on Mines, 3d ed., Vol. 2, Sec. 336).

Strictly speaking, the paragraph had no relation to an application to purchase under section 2347, Revised Statutes, since such an application is not made under a mining location or under the mining laws. The only rule or regulation made by the Interior Department relating to contested coal applications under section 2347, Revised Statutes, when the State pro-

tests, is the rule set up in the answer, par. 6, R., p. 8—*i. e.*, *Re* Utah, 32 L. D., 117 (which was the only decision on the subject up to the time of the Braffet decision), that applications to purchase coal lands—*i. e.*, school sections—should not be allowed in the absence of a determination by the local land officers that the land was known to be chiefly valuable for coal deposits at the time the State was admitted into the Union, and Braffet fully and in every detail followed that rule. He made his application; he could not make the necessary proof of the known prior quality of the land until he made his application and the same had been received; then, under the regulation of the department, the local land officers gave notice to Utah of Braffet's application. Utah and the coal company appeared and protested the application, claiming that the land was not known coal land on admission day; and Braffet, proceeding under the protest, made his case, which was deemed insufficient by the land officers, and they granted the motion of the protestants to dismiss the application, which was reversed by the Commissioner, and in turn the appellant affirmed the decision of the Commissioner, that the applicant had established the known mineral quality of the land prior to admission day, and that the granting of the motion to dismiss was erroneous.

So we contend that Braffet fully complied with every detail of any existing regulation relating to the subject-matter, which was the rule of action prescribed in the case of *Re* Utah, 32 L. D., 117, and set up, as we have seen, as one of the basic defenses in the answer of the appellant.

Now, we say that, treated as a contestee, or a protestant, or a contestant—call him what you may—he had legally made his application to purchase, and the application had been legally received, and he had complied with the regulations of appellant concerning proof of the known quality of the land on admission day; but appellant seeks to reduce this legal application to purchase to a mere application to contest an entry of an entryman by a person entitled as a preemptor, homesteader, or a timber-culture entryman, under the Act of May 14, 1880 (21 Stat., 140), to a preferred right of entry—*i. e.*, a settler on the public lands, who by his settlement and occupation had become possessed of a prior right of entry over one who invaded his rights which flowed from his settlement, and which adverse filing had been illegally secured through the entry of a preemptor, homesteader, or timber-culture entryman, and which settlement rights gave the contestant settler a preferred right to entry when he had by his contest overthrown the illegal filing. Then the Secretary, appellant, claims that, since Braffet was neither one nor the other of those persons, his contest was futile and he could depart upon his way *sans* money, *sans* land, *sans* everything. Such is the position of the appellant, based on his proposition that the extinct rule of regulations of March 6, 1903, *supra*, reduced Braffet and his application to the *status* of a person who, without interest in the subject-matter, had initiated, under the Act of May 14, 1880, *supra*, the contest against an entry existing on the records of the local land office, and which precluded applications to pur-

chase under Section 2347, Revised Statutes, until the mineral quality was determined, and it could not be determined by anyone, he claimed, but a preemptor, homesteader, or timber-culture applicant, all precluded and *interdicted* from securing coal lands under guise of an agricultural or timber-land entry—a unique, but not an interesting or logical theory.*

Indispensable Parties.

The Coal Company, appellant, contends (Brief, p. 32) that even if the lands here were not within the grant, nevertheless they had presumptively passed to the State (Rule 1 of the regulations of March 6, 1903), and since, under said regulations there had not been at the time of the grant a dissimilar determination, the coal company became a *bona fide* claimant *in fee*, and when it exchanged its title for a lease, it became an indispensable party defendant.

The record, pages 13-14, discloses that the appellant stipulated that the cause should be submitted to the court under bill and answer. The appellant had suggested in his answer that the coal company was absent from the record and thereon, under the rules of the trial court (Rule Eq., No. 31), brought the matter on for hearing, as a motion, as under such rule the matter of parties should be disposed of as a motion, but before said motion was effected, the appellant stipulated that

*Twice previous to the application of Braffet the department had classified the land as coal and offered the land for sale as coal land at specified price, and neither the State nor the coal company protested the classification or offer to sell.

the case should "be submitted on bill and answer"; he does not refer to the subject in his brief, but seeks to review his waived objection (R., page 15).

1. The rules of the trial court provide that no suit shall be dismisssed for non-joinder of necessary parties, but the rights of such persons shall be reserved.

Law Rule No. 28; Equity Rule No. 31.

2. The decree here expressly provides "No right of said Pleasant Valley Coal Company shall be affected by this decree" (R., p. 14, par. 2).

3. As a matter of law, no right of the United States, the State, the lessee or the lease is affected by the decree, and no right of either will be affected by the issuance of patent.

That the decree or the patent will not deprive the United States or the Coal Company of any right is obvious. When patent issues, it will only give the patentee legal capacity to sue; it will not put him into possession; he may only go to Utah and institute his action of ejectment or suit to quiet title, and if the coal company has any legal or equitable defense it may be interposed, and the patent will fall and the coal company will be secure in its possession under the lease. Scores of decisions have so held and the principle is enunciated in the case of U. S., etc., *vs.* Schurz, 102 U. S., 378, where this Court said:

> "The relator is, therefore, utterly without remedy, if the land be rightfully his, until he can obtain evidence of his title * * * on the

> other hand, when he obtains this possession, if there is any equitable reason why, as against the Government, he should not have * * * the United States can, by bill in chancery, have a decree annulling the patent. * * * If another party is for any reason recognizable in a court of chancery, entitled as against the relator * * * a court of equity can give similar relief. So it is plain that by non-action of the land department the legal rights may remain indefinitely undecided and those of the relator seriously embarrassed or totally defeated (as here), *while the delivery of the patent under the writ of mandamus opens to all the parties the portals of the court where their rights can be judicially determined.*"

The *Brady case* (263 U. S., 435), clearly has no application here. In that case Brady had been defeated on the merits in the Department, and sought to *enjoin* the issue of a patent to his successful opponent *without* making the successful one a party to the suit. There is nothing analogous in the situation, and Brady could secure any right to which he was entitled *after* the legal title to land passed from the United States by impressing a trust on the patent; but here the title will remain in the United States until it passes to appellee, and appellee otherwise will never be able to impress a trust on the land while the legal title remains in the United States; and further, it is impossible to impress a trust on a *discretionary* lease.

The point is further illustrated in

Doolin vs. Carr, 125 U. S., 618.

Kemp Case, 104 U. S., 636.

The United States is in nowise concluded by any matter, whether of fact or law, that may have been adjudged in a prior suit to which it was not a party. *Privett v. United States*, 256 U. S., 201; *Bowling v. United States*, 233 U. S., 528.

The situation here and in *Houston vs. Ormes*, 252 U. S., 469, is similar in principle to the case here.

There the United States had appropriated money for a specific purpose; here land had been appropriated for the specific purpose of disposition under Sec. 2347 R. S., and in the case this Court held that a suit against the Treasury officials to establish an equitable lien for attorney's fees on the fund was not one against the United States, since only a *ministerial* duty was at hand on part of the Treasury official, the enforcement of a legal right in equity.

The *appellant* cannot make a *judicial* determination of the rights of the Coal Company.

The Brady case would be analogous here if we sought to affect the lease or its administration, or if we sought injunction against the appellant in any way concerning or affecting the lease, or if the final order would in any way affect the lessor or the lessee or the lease; but it will not.

The decision will no more bind the coal lease than did the decision in the *Work-Louisiana* case, 269 U. S., 250, bind the homesteaders who were not made parties defendant in that suit. If the suit here will not adjudicate the rights of the lessee, how can it be contended the lessee was an indispensable party defendant?

Next, the appellant seeks to say the suit is in effect one against the United States, etc. (p. 7, Brief), and that, since the decree here holds its title void, it was an indispensable defendant. Without repeating what we here said *supra,* we point out that the defendant *did not* raise the issue by his answer and it *first* appeared in the court of appeals. The appellant did not move to dismiss in the trial court, and it is well settled, we submit, that where a defendant does not raise an issue by demurrer, or motion to dismiss, or by answer, he has waived every question except that of the jurisdiction of the court over the subject matter of the suit.

The subject matter of the controversy was decided in the local land office in the absence of the United States. There the United States, by mandatory statute, Sec. 2347 R. S., had directed the local land officers to sell coal land to competent persons. "Shall have the right to purchase vacant coal lands not otherwise reserved or appropriated"—and the suit under consideration here is to review the action of the appellant in obstructing that right to purchase, a right mandatory in its terms, and the United States is no more indispensable in the suit than it was in the local land office or in the appeal proceeding before the Commissioner, or before the Secretary. The latter found in the land office proceeding that Braffet had established a *prima facie* case, as pointed out in the court of appeals decision, and there was no question about his being a competent person.

The suit was no more one against the United States than any other case where the right of a qualified person to enter land under the public lands laws had been

denied by the Secretary through an erroneous interpretation of the law concerning the right to enter.

Unlike *Oregon vs. Hitchcock,* 202 U. S., 60; *Nagganab vs Hitchcock,* 202 U. S., 473; *Minnesota vs. Hitchcock,* 185 U. S., 373, and other similar cases, this is not a suit to determine title against the United States, but simply a suit to prevent the Secretary from obstructing the rights of appellee to complete his purchase, which does not affect the United States, nor is it conclusive against the leasing act or the lease or the lessee.

The United States offered its title for a price, Braffet accepted the offer, but was prevented from paying by reason of the illegal act in suspending the payment of the purchase price (Bill, par. 3, R., 2) until the determination of a "contest" to be conducted under an extinct rule relating to indemnity selections by the State, and then, as the court of appeals said, he bartered away the rights of Braffet in a thin air, to make a makeshift of a pretended lease. We did not attack the lease or the lessee in our bill, and in fact, mentioned neither, but the appellant dragged them into the litigation to bolster up his amazing errors concerning the regulations of March 6, 1903. We are only seeking to take such title from the United States that was offered to us at a price and, accepting the offer, the Secretary suspended the operation of an imperative statute, to give play to his fancy in his construction of a rule of contest that did not exist. (Payne *vs.* C. P. R. R. Co., 255 U. S., 228; Ballinger *vs.* The United States, 216 U. S., 240; Lane *vs.* Watts, 234 U. S., 525.)

Mineral school sections are subject to purchase under Sec. 2347 R. S., and appropriation under the mining law if the mineral quality is other than coal.

Notwithstanding the present claim of appellant to the contrary the department has always held that mineral school land sections were open to appropriation under the mining laws.

That the last paragraph of either regulation (Rules 1 and 16) could not relate to the validity of a subsequent mining location is shown in the case of *Utah vs. Allen,* 27 L. D., 53, where it was held that a location under the mining law could be made on a school section, and if Utah protested (as it did), the mineral applicant could proceed to patent, after establishing the *known* quality of the land, his discovery, etc.

In 1915, the then Secretary allowed the filing of a coal declaratory statement on school land, under Section 2348 R. S., in the face of a similar grant to New Mexico (after an approved survey), on a showing of the applicant that the lands were *known* coal lands (New Mexico protesting that the land was not known coal land), the applicant was allowed to enter under Section 2347 R. S. The Secretary, in holding the land subject to purchase after establishing the known coal character of the land, previous to the survey, amongst a large number of approving citations, mentioned *Re Utah,* 32 L. D., 117, the basic land office case concerning the rights of coal entrymen.

Tillian vs. Keepers, 44 L. D., 460.

In *South Dakota vs. Delicate,* 34 L. D., 717, and in *South Dakota vs. Walsh,* 34 L. D., 723, the department held that where the land was *known* to be mineral prior to the date of the approved survey, that the land was subject to mineral appropriation thereafter, notwithstanding the presumptive title of the State. The same ruling was had in *South Dakota vs. Trinity,* 34 L. D., 485; *Virginia Lode,* 7 L. D., 459; *State of Colorado,* 6 L. D., 412; *Re Miner,* 9 L. D., 408; *Warren vs. Colorado,* 14 L. D., 681; *Rice vs. California,* 24 L. D., 14.

The same rule is discussed at length by *Lindley* (3d ed., Sec. 144-145 216-217), and the Supreme Court of California, Utah, Colorado, (*Conn vs. Oberto,* 16 Pac., 369-70) and Nevada have decided likewise.

In the Olsen case (50 App. D. C., 119), it appears that Olsen made an application to purchase under Section 2347 R. S., and Utah appeared with its mesne grantee, a coal company, as here, joining in protest against the applicant, setting up the presumptive title of the State, etc. As the *Sweet* case was then pending in this Court, the then Secretary (Payne) suspended decision until the incoming of the *Sweet* decision; and thereon the secretary allowed the Olsen entry to proceed to patent to all the *surface* of the 160 acres excepting five acres on which the coal company had expended about $90,000.00 in visible improvement, and with actual occupancy of the five acres, but the secretary allowed Olsen a patent for the coal deposits in the five acres. There was no holding there that Olsen

could not proceed to patent. The case was cited by appellant in his decision (49 L. D., 212) and in the court of appeals, but is not referred to here for the probable reason that in the case and in *Burtis vs. Kansas*, 34 L. D., 304, it was held that a person holding a *bona fide* claim against the *State*, and thereby entitled to equitable consideration, could have the same satisfied through an indemnity selection by the State in its behalf. The coal company presumably intended to secure an agricultural and not a coal section. Such a presumption is the base of good faith and of equitable consideration, and the prior Secretaries of the Interior held that in these instances the State would be permitted to make the selection for the benefit of its grantee. But this coal company does not want an agricultural section; it wants a coal section, classified by the Interior Department of the value of $117,000!

In the *Ostenfeldt case* (41 L. D., 265), relied on by appellant as the base for his decision here, there was a mistaken expression on part of Assistant Secretary Adams, concerning the mistaken rule; but at that, Ostenfeldt was permitted to complete his purchase and proceed to patent. At the time his application was made to purchase, there was a stated classification price, but before Ostenfeldt made his payment the price was increased, and Assistant Secretary Adams, applying the canceled rule of contest, held that since the canceled rule controlled, the applicant was a mere contestant and the price could be increased. The decision was wholly erroneous, but is the only "authority" that the appellant produces or that he can pro-

duce, and is his only basis for the statement that there is an unbroken rule of practice for 40 years presented here.

There is not otherwise a decision in the 49 volumes of the land decisions, up to the time of the Braffet decision, holding that a school-land grant precluded the operation of the mining or coal laws, where, after an approved survey, an application for mining appropriation or coal purchase was made on proof of the known mineral character on or prior to the date attached to the grant.

Lindley, 3d ed., at Section 145 (Vol. 1), holds that—

> "School sections known to be mineral in character at the date of the approval of the survey do not pass to the State, but remain a part of the public domain, subject to exploration and purchase, the same as other public lands."

At Section 141 he says:

> "If at the time of such approval and filing they are known to be mineral, title does not pass to the State, but remains in the General Government and subject to its disposal under the mining laws (*Hermocilla vs. Hubbell*, 89 Cal., 5; *Olive Land Co. vs. Olmstead*, 103 Fed., 586; *Cosmos, etc., vs. Gray Eagle*, 104 Fed., 20; S. C. on appeal, 190 U. S., 301)."

(See footnotes, *Lindley on Mines*, 3d ed., vol. 1, p. 255, where 20 similar decisions, including decisions of this Court, are set forth.)

Lindley, in Section 144, p. 266, vol. 1, 3d ed., concerning the matter, says:

> "As sixteenth, thirty-sixth and other specially designated sections pass to the State, in the absence of legal impediment, by the survey *ex propria vigore*, or by the admission of the State after survey, there is no preliminary adjudication, actual or presumed, by the Land Department as to the character of the land. There is no antecedent judgment, as there is in preemption or homestead cases, which is final and conclusive upon collateral attack. The return of the surveyor general is in no sense such an adjudication. It follows that the question may be raised at any time by anyone in privity with the Government of the United States. The holder of a valid subsisting mining location is in such privity."

Before this application for *certiorari* was made, appellee gave notice to counsel for the appellant that the records of the U. S. land office at Salt Lake City revealed that, prior to the application of Braffet to purchase, twenty-nine coal-purchase applications and mineral appropriations of school selection had been allowed, and that none were rejected except the application of Braffet. Since the appellant does not dispute the local land office record, despite the notice of the fact, we assume we are justified in making the statement to establish the long-continued practice in such instances.

Abandonment of Contest and Withdrawal of Protest.

The decision of the learned court of appeals concerning the effect of the action of the State and mesne grantee in abandoning the contest and withdrawing the protest needs but little comment. The appellant only suggests

(*a*) that the "important fact" was overlooked that the "withdrawal was without prejudice to the interests of the intervenor," (tr., pp. 28-32)

(*b*) that same was more than two years after the passage of the Leasing Act, and therefore the application of Braffet was destroyed. No other comment is made by appellant.

Concerning the first suggestion, we point out that it has been the uniform practice of the Department of the Interior to uphold the logical, common-sense proposition that an abandonment of contest must be unconditional (10 L. D., 133; 12 *id.*, 334; 18 *id.*, 233; 5 *id.*, 40; 5 *id.*, 385; 7 *id.*, 394; 11 *id.*, 166; 12 *id.*, 495; 13 *id.*, 437; 46 *id.*, 164).

The withdrawal of contest leaves the issue between the entryman and the United States (7 L. D., 394; 5 L. D., 40; 5 L. D., 385; 9 L. D., 391; 11 L. D., 166; 12 L. D., 495; 10 L. D., 133; 12 *id.*, 334; 13 *id.*, 121-437), (a long established rule of practice, 40 years).

Withdrawal of contest by attorney conclusive (4 L. D., 267).

The waiver of claim and withdrawal from contest was a relinquishment which when filed is equivalent to

cancellation under the Act of May 14, 1880, 1 L. D., 122, when filed operates *co instanti* releasing the land from entry (3 L. D., 343, 4123) and in scores of other cases to be found on pages 625 to 633, inclusive, Digest of Decisions of the Department of the Interior, Volumes 1 to 40, all of which hold that the withdrawal or relinquishment must be unconditional and takes effect immediately and removes the obstacles in the way of the applicant; here the relinquishment removed all third parties, etc., from the contest, leaving the issue between the Government and Braffet under Sec. 2347, R. S. (and the Government was not contesting).

The case against the coal company's and the State's position here is even stronger. Claiming the State was the entryman, they *withdrew* their defenses: claiming to be the *contestees* defending against the contestant of the State's "entry," they withdrew *from* the contest. That left the record clear, since the land could not be disposed of to a *third* person until the "claim" of the State was canceled in the records of the local land office and it will always be presumed antecedent duty was performed by local land officers.

> "The local officers were correct in holding that a conditional withdrawal cannot be accepted. As the conditional withdrawal was made a part of the second application (*i. e.*, the lease) to contest, the rejection of the withdrawal carries with it the second contest." (*Mallman vs. Halff*, 46 L. D., 164.)

Vacant Land.

Appellant, brief, p. 6, contends,

(*a*) that on the date of the Braffet application, the land was not vacant coal land subject to purchase, and therefore and by reason of the said rule 1 of the regulations of March 6, 1903, Braffet was a *mere* contestant, acquiring no rights to the land.

(*b*) that prior to the conclusion of the contest, during which he was held to have made out a *prima facie* case against Utah, Congress passed the leasing act and, thereby, the right of Braffet to complete his purchase was entirely cut off. Later, and throughout his brief, appellant seeks to uphold this peculiar theory by saying, since Braffet had not a *vested* right he was not within the exception of the leasing act which saved "existent valid claim," but the similar contention was overthrown in the case of *United States vs. Stockley*, 260 U. S., 532, when this Court said:

> "The bar of the statute likewise prevails, notwithstanding the executive withdrawal of December 15, 1908. The validity of that order is, of course, settled by the decision in *United States vs. Midwest Oil Company*, 236 U. S., 459; 59 *L. ed.*, 673; 35 *Sup. Ct. Rep.*, 309; but, as already stated, there is excepted from the operation of the order 'existing valid claims.' Obviously this means something less than a vested right, such as would follow from a completed final entry, since such a right *would require no exception to insure its preservation.* The pur-

> pose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated, and which, upon full compliance with the land laws, would ripen into a title * * *."

Concerning the second suggestion, that the Leasing Act cut out the application of Braffet, because it was not a vested right, appellant, contending for that proposition (Brief, p. 31), cites only *United States vs. Morrison,* 240 U. S., 192, a case which simply held that until an approved survey identified the school sections, the lands were subject to otherwise congressional disposition, since the right of the State did not attach to the lands until identified by an approved survey. We have no quarrel with such a proposition, but the base for it is not here.

United States vs. Stockley, supra.

The statement that the coal-land laws are now repealed is too broad, as such laws are still applicable to valid claims existent prior to February 25, 1920, as expressly stated in Section 37 of the General Leasing Act; and in the last paragraph of Section 5 of the coal-land regulations, approved by the Secretary of the Interior, April 1, 1920, it is stated:

> "As to coal, those claims initiated under the pre-existing law may go to patent, which, at the date of the act, were covered by valid coal declaratory statements or application to purchase which are timely, followed up and per-

fected in accordance with the controlling coal-land laws (Sections 2348 to 2352, Revised Statutes) and the regulations thereunder."

Concerning the Further Proposition of Appellant that the Application of Braffet was Invalid While the Claim of the State Remained Uncanceled on the Records of the Local Land Office, i. e., Not Vacant Coal Land.

That the invalid claim of Utah did not amount to an entry has been settled by this Court.

Chotard vs. Pope, 12 Wheat., 586.

The appellant, however, cites the case of *Durnford vs. Fall,* 52 App. D. C., 153, as holding an application to purchase coal lands under Section 2347, Revised Statutes, could not be made where the land at the time of the coal entry was not vacant coal land of the United States; but there it was in the actual occupancy of a mining locator under a placer mining location. And after citing the case, founded on a universal mining law and which no mining lawyer would even think of disputing, the appellant says (Brief, p. 25):

> "In the Durnford case physical occupancy removed the lands from the category of public lands, and here the *record* claim of the State had the same effect." (No citations.)

In the court of appeals the appellant presented the Durnford case and urged there with all the force attached to it that the claim of Utah was equivalent to physical occupancy, but the court of appeals refused to apply the case as contended for by the appellant.

At page 24 of the brief, appellant makes an erroneous statement, that vacant lands are those absolutely

free, *unclaimed* and unoccupied, and cites the *Olsen* case, 50 App. D. C., 119.

In the Olsen case a coal company, under a patent from Utah, entered into possession of the land and remained in open, visible occupation and expended $90,000 on improvements on five acres of the land; and the Secretary, while refusing patent to the surface of the five acres, gave the coal deposits to Olsen. Here the coal company was not in occupation of any part of the land and never expended a dollar on the land, and there the court of appeals sustained Secretary Payne.

In the case of *Cosmos, etc., vs. Gray Eagle, etc.,* 112 Fed., 4, affirmed in 190 U. S., 301, one Clark, a forest lieu scripper, attempted to select under the forest lieu act, as detailed in the case, land covered by four subsisting placer locations under the mining law, and the courts held the lieu selection could not be made, as the land was not vacant or unoccupied. There was nothing said in the decisions about a "claim," and every mining lawyer knows a "mining claim" is an *estate of freehold,* and up to this time the "claim" of Utah has not been so regarded. "Mining claim" is the vernacular of mining men, meaning a lode or placer location. A good example is the *Durnford* case, cited by appellant at the same point (Brief, p. 24):

> "Vacant lands are unoccupied lands." (*Shaw vs. Kellogg,* 170 U. S., 312.)
>
> *Lindley,* Secs. 166-170, 173, 216, 217, 218, 219-679.

What record claim of the State was on the records of the local land office that suspended the operation of Section 2347, Revised Statutes, until it was canceled on the records of the local land office? What reason

or authority exists that an invalid claim of the State to known mineral land to which it had neither legal, equitable, presumptive, o any other kind of a title was the legal equivalent of an entry of record in the local land office? As we have seen *supra,* no such ruling was ever made by a court or department up to the time of the Braffet decision.

We submit the theory carries its own refutation.

Appellee's Remedy.

Then appellant claims that appellee's remedy is at law and not in equity (Brief, p. 37).

He did not so contend in his answer; he did not even deny the allegation in the bill that plaintiff had no adequate remedy at law. He made no motion to dismiss the bill nor did he set the same up by answer on the now alleged error, and we submit that in failing to do so he waived the question (Eq. Rule No. 28, D. C. Sup. Ct.) This rule also covers the point that the United States was an indispensable party.

Mandamus would not lie in the suit; it could not review the errors of law or the errors of the appellant in the construction of nonexistent regulations, the presumptive title and the mass of errors leading up to the abandonment of the contest and the withdrawal of the protest, and especially so after the proceeding was closed.

The case here is analogous to the cases of *Work vs. Read, Payne vs. Central Pacific Railroad Company, Lane vs. Watts, supra,* and within the expression of

Mr. Justice Van Devanter in *Payne vs. Central Pacific Railroad Co.*, when he said:

> "Our conclusion is that, in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellant departed from a plain official duty, and that to avoid the resulting injury to the plaintiff for which no other remedy is available, an injunction should issue directing a disposal of the selection on the merits, unaffected by the withdrawal."

The rule is that, once a Federal court in equity acquires jurisdiction under proper cause, it will retain control of the parties and the subject matter, and do complete justice to all concerned, even *to the extent of enforcing purely legal rights.* The test is whether the facts existing when the action was begun were sufficient to confer jurisdiction on the court (see *Doak vs. Hamilton*, 15 F. (2d), page 778, where a number of cases, including those of this Court, are cited by the court in support of the proposition).

The suit here is akin to that of *Twist vs. Prairie Oil Company*, decided by this Court on June 6, 1927 (Advance Opinions, page 859), where the situation is similar, in that the answer is like here, namely, that petition be dismissed for want of equity, but the proceedings in the trial court and in the court of appeals were those customary in equity causes, and after the answer was filed the defendant stipulated that the cause be decided on the merits under bill and answer. The clear decision of this Court in that case does away

with the many uncertainties concerning the at times slight distinction of cases at law and causes in equity which have been productive of much trouble, litigation and expense without reaching a decision on the merits of the case or the cause.

The Application of Braffet.

While it was not assigned as error in the court of appeals or presented here as a question, or included in the specifications of error here, the appellant, in a sort of narrative way, says, at page 19, (*c*) that the functions of the local land officers had on November 10, 1915, been suspended and directions given to local land officers to receive and transmit to the General Land Office all applications to enter, based on alleged mineral character, until further orders, and such instructions remained in full force until June 13, 1918, and therefore the filing of the application gave Braffet simply the status of a contestant of the claim of Utah, and he in no sense secured a vested interest in the land.

No source of the withdrawal order is given, but the fact is that while Braffet's application was made on February 4, 1918, no steps were taken by the local land officers until about July 25, 1918, when the application was allowed and Braffet was directed to pay the classified price within fifteen days; but before he could do so the appellant prevented him from so doing until the determination of the contest. We assume no point was intended by the narrative of appellant except, since Braffet made his application at a time when it is claimed the functions of the local land officers were

suspended except as to receiving the applications, that thereby, while no point is raised as to the right of Braffet to present the application and pay the legal fee, as he did, the suspension changed the application to purchase into an application to contest the claim of Utah under the extinct rule. That is what appellant says, and for that reason no special answer will be made to the narrative.

Appellant follows up the statement by claiming it is a well-settled rule in the department that no application will be received or any rights initiated for a tract embraced in any entry of record until the existing entry has been canceled on the records of the local land office (Brief, pp. 21, 22, 23). *This is probably the 40-year rule he is contending for.* No one disputes it, and it is not involved here, since the invalid claim of Utah was not an *entry* of the public lands in the local land office. No court ever announced such a rule of law concerning a "claim" of a State; no Secretary until now ever said there was such; no regulation or rule of the department ever so announced; but the Secretary here applied the extinct indemnity selection regulation (rule of contest) of March 6, 1903, to the situation.

In *Mallman vs. Halff*, 46 L. D., p. 164, this appellant, construing Rule of Practice 2, the rule invoked by him here as the rule of contest so referred to that must determine the Braffet application, said:

> "Rule of Practice 2 requires an application to contest to contain a statement of the law under which applicant intends to acquire title,

> and facts showing he is qualified to do so. The reason for this rule is obvious. It was intended to prevent contests by persons who were not qualified to exercise the *preference* right awarded to successful contestants."

The so-called entry of the State never was made, and it will never be canceled, since it never existed. The appellant does not claim it was the equivalent of an entry, but that it was an entry, and therefore could only be contested as provided for in the act of May 14, 1880 (21 Stat., 140) (and said Rule 2 of General Practice), which provided for contests by "settlers"—*i. e.*, that Braffet was a "settler" and made an application to contest as a "settler" the entry of Utah, the entryman! All these paradoxes flow from the false premise, the extinct rule.

Just why appellant cited *Work vs. Rives*, 267 U. S., 175 (and the cited cases in the opinion of our learned Chief Justice), is not apparent, as that case is one of the outstanding decisions that mandamus will not lie as a writ of error, and that decisions of executives to whom judgment and discretion in the administration of a statute is committed will not be reviewed by mandamus, which will never operate as a writ of error; all of which is a good reason why mandamus was not sought here.

The proposition here of appellant is that no construction made by him of any law of the United States committed to his administration is reviewable by the courts at law or in equity, however erroneous, unless it is arbitrary or capricious and he would have this

Court apply the *limited* rule of the *Decatur* and *Rives* cases to every instance of the construction of an administrative statute which would relieve the Secretary of all restraint and make him the chief legal force of the United States. Here he contends the remedy is only by mandamus and if the proposition was granted he would then probably contend that since *Decatur and Rives* held review could not be had by mandamus the appellee would be without remedy, probably overlooking, as he does here, that the *Rives* case related to the distribution of a Congressional *gratuity* and the statute granting it expressly providing the distribution should be final and conclusive and that no court should have the right to review the distribution of the gratuity of the United States amongst those unfortunate persons that complied with the request of the United States in time of peril and war.

In connection with the subject, appellant claims (Brief, p. 30) that, "so long as the title to the tract was *sub judice* in the Department on Braffet's 'contest,' Braffet could neither seek his purchase under Section 2347, R. S., nor secure vested rights to the land, and that his claim was clearly not within the exception of the leasing act." A fundamental rule relating to the doctrine of *sub judice* is that of relation—*i. e.*, that when the claim is established by relation it becomes effective as of the date of the initiation. The rule of relation is well established in the numerous decisions of this and other courts in the Mexican land-grant cases, where it was uniformly held that when a Mexican grant claimant established his grant before the

United States Land Commission, and that special tribunal confirmed the grant, then, by relation, the confirmation was of the date of the grant and cut out all subsequent claims arising under other attempted disposition of the lands under the law of the United States.

The case of Kerwin *vs.* Murphy, 189 U. S., 35 (Brief, p. 32), is not applicable here for the following reasons, namely, that the suit was one to enjoin the Land Department from proceeding with a survey which it was claimed would, if carried out as threatened, prejudice the rights of the plaintiff and all other claimants of like character with him, and the courts simply held that the bill did not show that it was necessary for the prevention of irreparable injury and of a multiplicity of suits as to constitute grounds for equitable relief by injunction against a threatened survey, under the direction of the Land Department, of lands to which claimants asserted title, but which the department claimed were unsurveyed public lands of the United States, and where such survey could be made without material injury to the soil or timber, and where persons directly interested in such survey are not made parties, are not numerous, and assert separate and independent rights, and therefore the court held it could not interfere with the executive administration of the Land Department, as it was purely an administrative function concerning the *physical* fact.

Neither is there anything adverse to appellee in the citation (Brief, p. 20) of *Shepley vs. Cowan,* 91 U. S., 330. The grant there was not one of place, but one of

quantity, dependent on a survey to be made by the Secretary of the Interior, and the court merely held there that, until a survey was made by the Secretary, the State could not assert title under its own action and pass it away by patent, as the grant had not attached until its boundaries were determined, just as a school grant would not attach until the sections had been identified by an approved survey.

Neither are the cases of *Stewart vs. Petersen*, 28 L. D., 515, or *Holt vs. Murphy*, 207 U. S., 407, applicable here, since the principle announced in those cases is not disputed here, namely, that an entry will not be allowed in the presence of a previous uncanceled entry existing on the records of the local land office. What we contend here is that a claim of Utah that she had taken present title under the school land grant to mineral school sections is not an entry that precluded the application of Braffet.

The claim was broadly asserted before the Sweet decision, supported by a decision of a circuit court of appeals, that all mineral sections had passed to Utah, but after the Sweet decision the pretension was *functus officio*.

Likewise with the citation of *Cameron vs. United States*, 252 U. S., 450, cited in Brief, page 17, namely, that so long as the legal title remained in the United States and proceedings for acquiring it by an applicant under the land laws were pending, the courts would not interfere to control the exercise of power to determine the rights of the applicant, etc.; all of which no one will dispute; but the situation is not here, since

the appellant admits the proceeding in the department has been closed and that appellee has exhausted the procedure of the Land Department (Answer, par. 16, R., 12; Bill, par. 16, R., 5).

We are not seeking, and could not seek, to control a proceeding pending and under determination in a department where findings of fact by the Secretary are conclusive, nor would we seek to anticipate a ruling of law; but that the erroneous rulings of law affecting a right of a qualified person under the land laws of the United States may be reviewed by the courts is so well settled that citation of authority might well be deemed trite.

As said in *Plested vs. Abby*, 228 U. S., 42 (and for some strange reason cited by appellant (Brief, p. 16), "While title to the public lands remains in the United States and proceedings for acquiring that title are still *in fieri*, the courts are without power, by injunction or otherwise, to control the judgment and discretion of the officers of the Land Department."

True, but the Braffet application is not pending, *in fieri* or otherwise, in the department. The department is through, has exhausted its jurisdiction and closed the proceeding, and the only jurisdiction present is that of the courts. The juridical temperament of the appellant is well (or otherwise) expressed in a recent decision, *Re Day*, 50 L. D., p. 24, where it is said: "The rules of law as administered by courts are binding upon the Land Department *only* in so far as they are not adverse to, but assist, its function as an administrative branch of the Executive Department of the

Government, which, as the proprietor of the public domain, is a party to all proceedings looking to the disposal of any part of that domain, and in its executive administration is entitled to rely upon and adhere to the classification of its lands, once arrived at, even though between others than the parties to a new application to entry." This principle, of paramount nature, of the administrative side of the Land Department work, rather than its function of adjudicating the rights of private claimants, entitles it, in so adjudicating, to respect and follow its own former adjudications as to particular lands, even though not binding in strictness upon a new claimant."

The appellant made no motion for a new trial or for a rehearing in the trial court, and that court had no opportunity to listen to the points he later sought to raise in the court of appeals, and in the latter court he did not move for a rehearing, but came here with new questions, presented here for the first time, chief of which is his new proposition that the Leasing Act of February 25, 1920, authorized the barter, since the Leasing Act cut out the right of Braffet to complete his purchase. We submit, that question cannot be presented here.

Finally, we urge that *certiorari* should be denied here, and for the following reasons:

(*a*) That the question, namely, the construction by the court of appeals of a construction by the appellant of a rule of contest is not reviewable under Rule 35 of this Court.

(*b*) That the Secretary had no jurisdiction to adjudicate the validity of the conveyances running to the mesne grantee, the coal company; and, since it was a claim of title having its origin in a law of the United States, the Utah school-land grant, the question was one for the State courts to determine.

Shulthis vs. McDougall, 225 U. S., 561.

(*c*) that the question is moot, in view of the recent congressional action confirming mineral school sections to the State (Public No. 570, 69th Congress), which will render unnecessary the application of an extinct rule, either to a State indemnity selection, or a mining location on a mineral school section, or the attempted purchase of a coal school section.

Seven years have passed since the Leasing Act, which cut out the Coal Act, except as to existing valid claims, and all in all the questions are dead, passed into the great silence, and no revolution in land-office practice will occur by reason of the decree here, as is apprehended by the appellant.

We respectfully urge that *certiorari* be denied.

WALTER EDMUND BURKE,
Attorney for Appellee.

1119 Hollingsworth Bldg.,
Los Angeles, California.

Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 344.

HUBERT WORK, AS SECRETARY OF THE INTERIOR,
APPELLANT,

vs.

ROBERT I. BRAFFET, ADMINISTRATOR OF THE ESTATE OF MARK P. BRAFFET, DECEASED, APPELLEE.

ARGUMENT FOR APPELLEE BY MR. WALTER EDMUND BURKE.

WALTER EDMUND BURKE,
Attorney for Appellee.

INDEX.

MEMORANDUM.—Since the brief of appellee opposing the application for certiorari is fully indexed, containing all citations and propositions discussed here, we felt it would be unnecessary to reindex here.

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Preface.

While there is really no question before this Court but the construction by the court of appeals of a construction by appellant of an alleged rule of his Department, one that had been *annulled* 10 years before

this suit arose, the astonishing series of errors built up by the appellant on the annulled and cancelled regulation requires appellee's counsel, in support of his client, to file this argument in addition to the printed brief filed by him in opposition to *certiorari*.

With due respect to the learned Secretary of the Interior, counsel respectfully submits that a greater comedy of errors was never submitted to this Court than is presented by the record here.

In a preliminary way, we suggest that there is no question here that can, under the rules of this Court, be reviewed.

There is no Federal question here arising under the laws of the United States, nor is there a question concerning the application of any decision of this Court. All the questions here, except one or two of minor importance, relating to practice, revolve around the construction of a canceled rule, one that was annulled many years before the appellant sought to present it as the basis of his defense, coupled with the fact that the canceled regulation, when in existence, had no application to the subject-matter.

For the support of the preliminary objection to consideration, we present the cases of *Shulthis vs. McDougall*, 225 U. S., 561-9; *Hull vs. Burr*, 234 U. S., 712-20; *Norton vs. Whiteside*, 239 U. S., 186-8. (See appellee's brief opposing application for certiorari.)

ARGUMENT.

May it please the Court:

In lieu of an oral argument, appellee's counsel begs leave to submit it in this form, thereby making for accuracy and saving the time of this Court.

The case came here on the application of the appellant for *certiorari* to review the decision of the Court of Appeals for the District of Columbia affirming the decision of the trial court in substantive matters. All the essential facts are set forth in the decision of the court below (R., p. 17).

It will be noticed that the learned court of appeals did not hesitate to speak sharply of the inconsistent action of the appellant in disregarding the rights of the appellee, and we submit the language was amply justified. Seldom does the learned court below fail to speak in cold and measured language concerning a litigant, and it requires an unusual record to induce that court to depart from its custom, but we submit the justifying record is here.

No exception was taken or defense attempted by the appellant, in his application for *certiorari,* to the criticism of appellant made by the court below, and we will make no further comment concerning the subject.

The appellant attempts here to set up (to run around the end, so to speak) alleged errors not presented by him in either the trial or appellate court and which appear here for the first time, and they are severally noted following. That such course may not be followed is too well settled to admit of discussion.

The first of such alleged errors is that since Braffet had not paid the full purchase price ($117,000), he had no legal status that would prevail against the leasing act of February 25, 1920, since that act repealed Section 2347, R. S., which permitted qualified persons to purchase coal lands of the United States. The contention made here by the appellant is that since on the date of the leasing act Braffet had not paid the full purchase price of the quarter section, he had not a *vested right* to the land that was excepted from the operation of the leasing act, and that therefore such rights that had attached were wiped out by the repeal of the coal land laws.

The record clearly shows the issue was not presented by the answer, was not assigned as error in the court of appeals, and its first appearance is here, being assigned as error in the application for *certiorari* (R., p. 16).

We submit that, even if the issue had been presented by answer to the trial court and assigned as error in the court of appeals, the point would be without legal force.

The record clearly shows that Braffet duly made his application to purchase the coal land under Section 2347, R. S.; that he paid the filing fee required by law; that his application *was accepted* and given a serial number, as required by the regulations of the appellant controlling the local land office, and that thereon the local land officers, pursuant to the regulations of appellant, gave Braffet 15 days' notice in writing to pay the purchase price, but before the expiration of

that time the appellant made it impossible for Braffet to comply by suspending the acceptance of the purchase price until the contest instituted by Utah had been determined. That is the admitted situation, but now appellant contends there could be no valid existent right resulting, since Braffet had not paid the final purchase price before the date of the leasing act.

Speaking of the subject, the court below said:

> "If the lands in question were vacant coal lands of the United States when the application was filed, then Braffet's right to complete his purchase cannot be assailed. That the lands were vacant coal lands has been determined by decision of the Secretary in the original appeal, 49 L. D. 212, as follows: 'From a careful consideration of the evidence, the Department finds that the coal applicant (Braffet) has established *prima facie* that the land was known coal land on January 24, 1896; that the Commissioner's finding in this report was correct, and that the register and receiver erred *in sustaining the motion to dismiss.*' "

The position of the court below is sustained by the admissions of the appellant made in his answer, namely:

I. That on February 4, 1918, Braffet filed his application to purchase and paid the legal fee, and that on July 25, 1918, the application was approved (R., pp. 1-2, par. 3).

II. That on the date of admission of Utah the lands were a part of the public domain and *known* coal lands of the United States. No denial of these allegations

was made by the appellant, and these two admissions are fully in accord with his decision that in the contest proceeding Braffet had *prima facie* established such allegations.

III. Continuing, the bill of complaint alleges that the quarter section was not otherwise appropriated or reserved, and, answering same, appellant, by way of avoidance only, set up that at the time of Braffet's application *he* knew that the land was not vacant coal land not otherwise appropriated or reserved by competent authority. Surely, it cannot be said that such allegation was a denial of the allegation of facts. At best, it is only *arguendo,* a mere legal conclusion. Then follows, *arguendo,* that until the land had been found and determined (by some competent authority) to be mineral in character, title had presumably passed to Utah on its admission to the Union, and that the filing of Braffet's application was *in effect* but an application to contest the presumed title of Utah (Answer, folio 12, R., p. 7).

No other denial was made concerning the allegations of the bill of complaint concerning the application or the known quality of the land on the date of the admission of Utah into the Union.

In his answer (folio 9, R., p. 9) appellant set up, *arguendo,* that, since and after the application to purchase, the mineral leasing act of February 25, 1920 (41 Stat., 437), "had become a law, which said act repealed all previous laws authorizing sale of coal lands, except as to claims within the saving clause of Section

37 of said act, and that plaintiff's application was not a valid claim within the meaning of said act."

Appellant did not set up the same as an allegation of law or fact but alleged that he had so held in his Department decision (49 L. D. 212), but did not reiterate it in his answer nor did he allege that such was the fact, and the subject matter was not assigned as error in the court of appeals (R., p. 15).

The extraordinary legal contention of appellant is based, as he claims, on the proposition that no claim or application was a valid existent claim within the saving clause of Section 37 of the leasing act unless it had ripened into a legal title, and he based the contention on *Morrison vs. United States,* 240 U. S., 192, where this Court upheld the right of Congress to dispose of land included in a school land grant to a State up to the time of an approved survey. The citation is too clear to require any discussion and is wholly inapplicable here in view of the saving clause of the leasing act, except to wholly refute the contention of the appellant that Congress could repeal the coal land law to the extent that the repeal could upset rights lawfully initiated under it.

As near as can be ascertained, the further contention is that the application of Braffet was not the valid claim contemplated by Section 37 of the leasing act because of the fact that it had not reached a point where Braffet could by mandamus compel the Secretary to issue him a patent for the land, *i. e.*, all obstructions to the application removed and the purchase price paid and final receipt issued.

We submit that this Court has definitely held otherwise in defining the meaning of a "valid existent claim" in *United States vs. Stockley,* 260 U. S., 532, where Mr. Justice Sutherland said:

> "Obviously this means something *less than a vested right,* such as would follow from a completed final entry, since such a right would require no exception to insure its preservation. The purpose of the exception evidently was to save from the operation of the order claims which had been lawfully initiated and which upon compliance with the land laws, would ripen into a title." (Italics ours.) Appellant makes no reference to that case, but simply ignored it.

The decisive statement of the court below that the application of Braffet to purchase the quarter section is fully alleged in par. 6 of the bill of complaint (R., p. 2, par. 3) where it is alleged

> "That on or about the 25th day of July, 1918, the said register and receiver approved said application and subsequently directed said plaintiff to complete his purchase by payment within fifteen days thereafter at the price designated in the classification price thereof; but before the expiration of said period, by order of the Department of the Interior therein, said payment was suspended and deferred until the determination of the contest * * *."

Answering the paragraph, the defendant-appellant alleged (Ans., p. 6, R., p. 7, par. 6) (only).

> "That on June 13, 1918, the order of November 10, 1915, * * * was suspended and there

> upon, and on July 25, 1918, the local land officers *allowed the application of plaintiff as an application* and directed the issue of notice, etc.''; (italics ours).

and then proceeds, *arguendo,* that if the allegations of plaintiff's paragraph 6 were true, then the local officers acted without authority and contrary to the (cancelled) regulations of the Department (*i. e.,* the regulations of March 6, 1903), and that such acts were void and of no effect, and then defendant, *arguendo,* contended that what was really intended by the local land officers was to allow plaintiff's application as an initiation of a contest proceeding against the State, *i. e.,* as directed by the nonapplicable and cancelled regulation.

Surely in face of the foregoing, appellant will not be permitted here to say that Braffet lost his rights because the appellant would not permit the local land officers to accept the purchase price. It would have been an idle thing, a futile act for Braffet to tender the purchase price to the local land officers in the face of the order of the appellant suspending the payment until the determination of the contest instituted by Utah.

He tendered no such issue by his answer and made no assignment of error concerning the same in the court of appeals.

Then, too, his own rules concerning the attempted construction of Section 37 of the leasing act is against him. After the passage of the leasing act and on

April 1, 1920 (47 L. D., 490), we find him announcing as follows:

> "As to coal, these claims enacted under the preceding law may go to patent, which, at the date of the act, were covered by valid declaratory statements *or applications to purchase,* which are truly followed up and perfected in accordance with the controlling coal land laws." (Italics ours.)

Following this regulation, the appellant held, *re Forrester,* 49 L. D., 190, that "a valid claim existent" and "a substantial right" were equivalent and "either phrase denotes such a claim or right, existent *prior* to the leasing act, as, if regularly followed up, *would ripen into acquisition of ownership under the provisions of the former law.*"

To support his contention that the application of Braffet was not valid and that, *arguendo* the application to purchase was under the regulations of the Department, to be treated as a mere application to contest the presumptive title of the State inuring under an approved survey of the school land grant, it became necessary for the appellant to contend that the mythical claim of the State was the legal equivalent of a cash entry by a citizen, and that while the claim of the State remained uncanceled on the records of the local land office, the land was not subject to cash sale under Section 2347, R. S.; *i. e.,* that the claim of the State to *known* coal lands suspended the operation of the coal land laws.

To have a basis for this unique and extraordinary contention, it became necessary for appellant to create some legal barrier, and accordingly he set up in his answer (R., p. 8) the following matter: "but he avers that on March 6, 1903, a circular of instructions, approved by the Secretary of the Interior, issued out of the General Land Office, which circular *was* in full force and effect at the date of filing of plaintiff's application, as well as at the date of issue of notice thereon, as aforesaid, which circular in terms provided:

> "When a school section is identified, by the government survey, and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or public land laws, the presumption arises that the title to the land has passed to the State, *but* this presumption may be overcome by the submission of a satisfactory showing to the contrary. *Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as contest cases.*" (Italics ours.)

Under the last paragraph (in italics), the appellant contended, in the courts below and here in his brief in support of his application for certiorari, that

(*a*) Braffet's application was to be treated as a mere application to contest the "entry" of the State.

(*b*) That even if successful, Braffet could secure no right thereby, and that the only result of his successful

contest would be to cancel on the records of the local land office the *entry* of the State, and leaving the land open to the applicant, qualified first in time under the laws of the United States.

It will be noted that the paragraph in italics is the base of the defense that the application of Braffet was invalid.

A reader of the pleading, judge or lawyer, would naturally infer that the appellant was setting up an *existing* rule of practice relating to applications to make cash purchases of coal land under Section 2347, R. S., and at a casual glance it might appear the appellant had some basis for his contention, but when we examine the subject we quickly find that (*a*) the regulation related entirely to an entirely different subject, and (*b*) that it was canceled *years* before Braffet made his application to purchase.

The alleged regulation is to be found at 32 L. D., 39, and we find that the pleader omitted from the answer the special purpose of the rule, or the special purpose to which it was applicable. Turning to the book and page we find the following:

> "DEPARTMENT OF THE INTERIOR,
> GENERAL LAND OFFICE, *March* 6, 1903.
>
> Registers and Receivers of United States Land Office:
>
> SIRS: The following rules and regulations will be observed in the *adjustment* of the grants to the several States and territories made in aid

> of the support of common schools, where the mineral or nonmineral character of the lands sought to be *selected as indemnity,* or those made the base for an *indemnity* selection, is involved."

It only requires a glance to show that the vaunted rule that suspended the operation of Section 2347, R. S., related solely to an instance where the State tendered for the base of its indemnity selection a *mineralized* school section excepted from the operation of the grant, and the *presumption* was that the land was nonmineral, when it had been included in an approved survey, *but that the State* would be permitted to overcome the presumption and that in so doing the tendered school section would be the base for the indemnity selection.

But the pleader twisted the rule into an expression that the rule wholly applied to every instance where the citizen under any law of the United States controverted the claim of the State, and that in any such instance the presumption would be that the title had passed to the State, and that even if the citizen established the fallacy of the State claim, nevertheless no rights could be initiated or could accrue in any instance to the citizen, since his application to purchase could only operate a mere contest of the State claim without resulting rights.

But even if this plain purpose of the rule is controverted by judicial construction and thereby made applicable to the defense suggested here, it will be still

found inapplicable by reason of the fact *that* on January 10, 1906 (34 L. D., 365), *it was superseded and canceled* by school lands—Indemnity Regulation, Rule 16—which cut out the portion of former Rule 1 set forth above in italics and substituted therefor the following:

> "Claims of parties based upon mineral locations covering part of a school section, asserting that the same were known to be chiefly valuable for the mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patents under the mining law are presented (citing Mahogany No. 2, Lode Claim 33, L. E., 37; State of Utah, 32 C. D., 117)."

So we find the paragraph did not relate to the validity of the Braffet application nor was it existent at the time of his application.

Two rules or regulations divergent in purpose and character cannot exist at the same time, and, like a statute, the last expression on the subject must control.

It is evident that the purpose of regulation 1, of the first regulation, and of Rule 16, of the second set, related to the same subject in the main, namely, that where the State applied for an indemnity selection in the face of a mining application, asserting that the land was known mineral land at the time the grant attached to the State, *i. e.*, the date of the approved survey, then the validity of the mining entry *would not be determined in the State indemnity selection proceeding,* but would be determined when the mining

locator attempted to proceed to patent and would be determined only in such a proceeding; it is further evident that the first paragraph of each regulation, which are identical in tenor, was to *enable the State* to overcome the presumption attending a school section included in an approved survey and returned as nonmineral by showing that on the date the grant attached to the State the school section (or a part of it) was *known* mineral land and thereby excepted from the operation of the grant; and for that reason could only be used as a base for an indemnity selection of a nonmineral section. The errors of the appellant evidently grew out of three facts, namely, (*a*) he did not know at the time of his answer that the first regulation was limited as above described; (*b*) that he was not aware of the preamble or enacting clause of the regulation which limited its applicability, and (*c*) he did not know that it had been cancelled and annulled years before the application of Braffet. No rule of practice in the Department of the Interior can arise through mere oral declaration or expression of the Secretary except when he construes an existing duly promulgated regulation.

A Secretary may not point to a canceled rule and say "that is the rule of this proceeding regardless of the fact that it was cancelled years ago." but that is what he did in the Braffet contest proceeding which is under review here.

The further allegation in the answer setting up the case of *Re Utah*, 32 L. D., 117, will now be briefly con-

sidered. There Utah presented an application to the Land Office, asking that the mineral quality of designated land be determined, since the State claimed the land was included in its school land grant, and further alleging that divers applications to purchase lands, included in said grant, had been allowed by the local land officers.

The application to so determine was denied by the Land Office and the regulations of March 6, 1903, *supra*, were cited to uphold the proposition that mining applications would be determined at the time of application for a mining patent; but not on the application of the State.

Concerning the then existing granted applications to purchase, it was said the same "should not have been allowed in the absence of a determination that the lands were known to be chiefly valuable for coal deposits at the date the State was admitted into the Union."

The decision then proceeded to direct the local land office to give notice to all such persons that their accepted applications to purchase would be canceled unless within a *reasonable* time, and *after* notice to the State, *they satisfactorily* established that the lands were known to be chiefly valuable for coal at the date of State admission.

In fact, that is the only regulation ever made by the Department of the Interior concerning contests over school lands between a coal applicant and the State, and it is impossible to twist out of it, by any construction, a procedure that turned an application to pur-

chase into a mere contest of the right of the State that, even though successful, gave no rights to the coal applicant, except to go upon his way with only the satisfaction of upsetting the claim of the State and establishing the title of the United States. And we are willing to stand on that Land Office decision. The case did not apply the regulation of March 6, 1903, except as it affected the position of the State. There the State alleged that the lands had been returned as mineral, but the Secretary held that a mere mineral return by the surveyor general did not have the effect to take lands out of the grant, and in indicating how the State could establish the fact and make an indemnity selection referred to the then existing regulation.

It is apparent that Braffet fully complied with the practice announced by that case. He made his application, paid his fee, notice was given to the State, the State appeared, Braffet made a *prima facie* case and thereon the State abandoned the contest in the manner disclosed by the record and by the decision of the learned court of appeals.

Every contention of appellant here relating to the validity of Braffet's application and the results flowing from them are solely based on the infallibility of the construction by appellant only, of the annulled and cancelled regulation of March 6, 1903. There is no long-established rule of practice, of forty years or otherwise, involved here, but simply a mistake of the appellant in applying a canceled regulation which in fact was only applicable when it existed to an instance where the State applied for an indemnity selection,

using as a base a school section in part (or in whole), covered by an application under the mining laws, and, even if the coal-land law be defined as a mining law, the situation remains unchanged. There is no other rule that can be construed to uphold his theory or to defend his action.

III.

As we have seen, the Leasing Act expressly excepted "*valid existent claims*" from its operation and permitted them to proceed to patent under the public land acts on which they were founded. In other words, the Leasing Act did not *repeal* the particular act on which they were based in so far as the existent claim was concerned, and it will be noted the Leasing Act referred to valid existent claims and not to vested rights, the latter being an instance where the final certificate of purchase had issued, or where the land had been certified for patent, etc.

However, the appellant, without assigning the subject for error in the court of appeals, has vaguely sought to maintain here that, since Braffet had not secured a *vested right* under his application to purchase, the Congress could subsequently abrogate the coal-land law and that the application would lapse.

That the Congress could destroy the rights otherwise flowing from an unperfected right by repealing the law from which the right flowed, is not disputed, as the rule has been announced in numerous cases, such as *Morrison vs. United States, supra; Frisbee vs. Whitney, 9 Wall., 187; The Yosemite Valley case, 15 Wall., 77; and other cases;* which cases simply held

that settlement on public lands with a view to preemption, etc., conferred no rights on the settler until entry made and payments made after land had been offered for sale. And the essential inquiry here is whether Braffet secured a right falling within the exception of the Leasing Act, and not whether he had a vested right. The case here is like *Lytle vs. Arkansas,* 9 How., 333, cited in the Yosemite Valley Case, to the effect that a right lawfully initiated could not be defeated by failure of executive officers to perform their duty after the applicant acquired a right that would lead to the title of the government. Here, after the acceptance of the application by the local officers, the appellant suspended and deferred the payment of the purchase price and that situation continued until the Leasing Act came.

As said in the Stockley case, *supra,* a vested right would need no exception to preserve it, as the Congress could not legislate away a vested right, and therefore the exception in the Leasing Act did not refer to a vested right, but to a lesser right that would ripen into a vested right on due performance by the applicant; and such lesser right was the right protected by the Congress in the exception of valid existent claims. The vested right of Braffet would have accrued on the payment of the purchase price which appellant refused to permit Braffet *to make.*

The Secretary-appellant incidentally alleges that on the date of Braffet's application, namely, February 4, 1918, the functions of the local land office had been suspended by him, and the local land officers had been di-

rected to send all applications to the general land office (R., p. 6) and then proceeds, *arguendo,* to state that thereby and by reason of the (cancelled) regulation of March 6, 1903, said application to purchase was treated as an application to contest the claim of the State, and then proceeds, *arguendo,* that if the local officers *approved* the application to purchase, they acted contrary to law, etc., but he admits in the same paragraph that the land was restored to entry on June 13, 1918, and the allegation in the bill of complaint is that the application to purchase was approved thereafter on June 25, 1918, and that allegation was not denied by the appellant, but, while no assignment of error is made by the appellant concerning the same, he does allege, *arguendo,* that if the local land officers did approve the application, they acted contrary to the (cancelled) regulation of March 6, 1903 (R., p. 8).

Disobedience by the local land office of a regulation concerning the administration of a statute does not affect the rights of an applicant. In the Stockley case, *supra,* the local land officers issued a final receipt to Stockley in direct violation of an existing regulation of the land department that local officers should not receive the purchase price or issue final certificates, but must suspend the entries, etc.; but this Court said it did not matter.

Here the application to purchase was accepted, and given a serial number, and all fees required by law were paid by applicant and accepted by the local land officers, who thereon gave to the applicant the 15 days' notice to pay the purchase price; and thereon the ap-

pellant intervened and obstructed the payment of the purchase price by suspending the acceptance of the same until the determination of the contest filed by Utah.

If the right of Braffet is to be considered as an *inchoate* right, still it was preserved by the express language of the Leasing Act, and takes it out of the Frisbee-Whitney rule relating to vested rights.

Here the Secretary-appellant, confronted by the saving clause of the Leasing Act, held that the application to purchase conferred no rights on Braffet, as under the operation of an annulled and canceled regulation it was but a mere application to contest the presumptive title of Utah arising under a school land grant that excepted known coal lands from its operation! If it were not for his mistaken application of a non-existent rule, it is fair and logical to presume he would have held otherwise, and then it would at once become apparent that Braffet had a "valid existent claim" that would have ripened into a patent on payment of the purchase price, which the appellant prevented him from making.

So, we have no quarrel with the Frisbee-Whitney case, or with any similar expression of this Court, because the question is not here. Neither is the question of a vested right here, and if there is any question here (there being no assignment of error in the court of appeals) it is simply whether the application of Braffet was a valid existent claim that could have legally ripened into full legal title if there had been no illegal obstruction created by the Secretary-appellant; and

concerning that matter, we urge that the Braffet application is within the definition laid down in the Stockley case by this Court, but the appellant held it was not even a right or a claim of right, since the *cancelled* regulation suspended the operation of the coal-land law and precluded even the making of a valid application to purchase. And then he contends that his illegal act in preventing Braffet from completing his purchase must operate against the innocent one and not against the wrongdoer.

IV.

The applicant set up in his answer (R., p. 12), and urged in the court of appeals, that the Pleasant Valley Coal Company was an indispensable party to the suit, the argument being, apparently, that since the corporation was a subsequent lessee of the controverted lands, under the Leasing Act, an adverse decision here, in its absence, would destroy the lease and the rights of the lessee under it. The record fully discloses (R., p. 14) that after the suggestion was made, the appellee brought on a hearing of the question under the rules of the trial court, as a motion; and thereon the Secretary-appellant *consented that the case be submitted for decision on the merits under bill and answer* (R., p. 14).

While it must be apparent that thereby the Secretary-appellant is not in position to renew the objection here, and upset a trial and determination had on his consent and stipulation, we urge that the objection in the first instance was without legal force, since, in any event, no right of the alleged lessee will be affected,

impaired or destroyed by the affirmance of the decree of the trial court. The legal result of affirmance will not oust the corporation from the land; a patent on payment of $117,000 will issue to appellee, and thereon he must take his patent to the courts of Utah and institute his action of ejectment, and any defendant in that suit may set up his alleged lease, and if valid, the lease will defeat the patent. The proposition has been upheld time and time again, as will be seen by reference to appellee's brief in opposition to the application for certiorari.

The main reliance of appellant for his contention is the Brady case, 263 U. S., 435, but its utter inapplicability will be seen by a glance at the case.

There Brady sought to enjoin the Secretary from issuing a patent to Harper, who had defeated Brady in a department contest for the land, the Secretary holding that Brady was without right in law or in fact; and thereon Brady sought injunction against the Secretary, but did not make Harper a party defendant. We do not seek to enjoin the Secretary from executing the lease, nor did we seek to maintain any claim against the lessee. In fact, we did not mention either in our bill of complaint, but the matter was injected by the Secretary-appellant. Until patent issues we cannot assert any right against the alleged lease or lessee, either at law or in equity; neither can we enjoin the Secretary or the alleged lessee from asserting the lease; neither have we a remedy at law or in equity. We cannot impress a trust on the Federal lease, as we might possibly

do on a patent. We cannot in equity impress a trust on the judgment or discretion of the Secretary in the matter of selecting a coal tenant under the Leasing Act. Our position as a patentee simply gives us our day in court, where we must establish the invalidity of the alleged lease if it is presented as the basis of the defense in an action of ejectment or in a suit to quiet title; while in the Brady case the granting of an injunction, etc., would have destroyed the rights of Harper without giving him an opportunity to assert and defend his rights; and he would be utterly without remedy.

Here the coal company is probably in possession under an alleged lease from the United States, though the fact is not disclosed by the record, and if it is valid, the patent falls. We have discussed the point and cases fully in our brief opposing certiorari.

V.

While the Secretary-appellant here claims the United States is an indispensable party to the suit, he did not present the objection by answer, but raised it for the first time in the court of appeals.

We submit the same reasons apply to the suggestions that we set forth in answer to the proposition that the alleged lessee was a necessary party.

No right of the United States will be affected by the patent. They may resist the patent by appearing in the ejectment suit, or they may bring direct suit to cancel the patent, or they may bring suit to quiet their title.

It is a fundamental proposition of law, often announced by this court, that the United States are never bound by any judgment, order or decree in any suit to which they were not parties.

VI.

It was set up in the answer, but not assigned as error in the court of appeals, that the suit was one against the United States and therefore could not be maintained.

The basis of such an objection necessarily is that the result of the suit will be (*a*) to bind finally the action of the United States, or (*b*) to take something away from them. As we have seen, the issuance of the patent can not in any way bind either the United States or the alleged lessee, and nothing will, in any event, be taken from them except for value, the classified coal value of $117,000, established by the Government.

The United States offered to sell the land to any qualified citizen for the classified price, *and Braffet accepted the offer* and made his application to purchase in the manner directed by law.

The Secretary-appellant *obstructed* the application, after its acceptance by the local land officers, and the suit, practically, is to remove the illegal barricade erected by the Secretary-appellant, and that being done, to proceed to patent. The United States have nothing to do with the matter, except to refuse patent until the payment of $117,000 is made by the appellee.

They are merely lookers on. The application having been duly made and accepted, they cannot withdraw the offer. Their servants, the land officers, are only affected by the final decree and this suit is against a servant of the United States and not against the master.

VII.

Finally, the Secretary-appellant contends that the remedy of appellee was at law, and not in equity; by mandamus, and not by mandatory injunction.

He did not move to dismiss on such grounds *but appeared generally and answered on the merits.* In his assignment of errors in the court of appeals he did not raise the question, but simply claimed the trial court erred in holding the plaintiff was entitled (generally) to mandatory injunction directing that plaintiff be permitted to complete his purchase. In his answer he did not question the jurisdiction of the court.

The suit was brought in equity and treated as an equitable suit from the start by both sides, and this Court has frequently held that in such an instance, either equitable or legal remedy may be administered as the facts require or warrant. In the Supreme Court of the District of Columbia such procedure is so authorized by rule; legal and equitable causes may be joined and appropriate relief awarded; and it is not for the Secretary-appellant to question the procedure of that *court of general jurisdiction.*

Under the rule of the common law, which governs the writ of mandamus, no review of the decision of the

Secretary could be had and his decision relating to the presumptive title of Utah, the rules of his department or the construction of the same could not be had by the common law writ.

Braffet had no remedy at law or by appeal and his only remedy was in equity, since the secretary-appellant held as a matter of law that Braffet was precluded by the canceled regulation from making an application to purchase, and that under a nonexistent regulation his application to purchase was a mere application to contest the claim of Utah. That was a ruling at law on undisputed facts. If he had found as a fact that Braffet was a qualified applicant, but through some extrinsic fact his application was without legal force, it well might be that mandamus would lie. Here the Secretary-appellant did not refuse to act, but acted erroneously through the exercise of his judgment and construction of a statute which was not merely ministerial, but which required a determination on his part as a fact that the land was known coal land on the date the grant attached to the State. He so found, and if he had stopped there mandamus would lie; but following his finding of fact he proceeded to act erroneously, and it is only by indirect review by mandatory injunction that the error may be reached *and the obstructions removed.* It may be that in Illinois or New Jersey the rule is different, but such is the rule of action in the only court of general jurisdiction having jurisdiction of the persons of the heads of executive departments, namely, the Supreme Court of the District of Columbia.

There has been some cursory expression by the Secretary-appellant that his decision is final and conclusive, since Section 2347, R. S., has been committed to him for administration; but hundreds of decisions of the courts hold otherwise. He can not bring this case within the rule announced in the Decatur and Rives cases. There is no bounty or gratuity here. Simply barter and sale; a fixed, valid, existent claim—or nothing. *Mandamus will require performance of duty to the extent of requiring decision to be made, but will not review a decision when made, which is the instance here.*

III.

Considerable stress was said on an excerpt from the Schurz case (102 U. S., 378), to the effect that while the title to the land remained in the United States and proceedings for acquiring it were yet *in fieri* the courts should not interfere to control the exercise of the power vested in the Department of the Interior; all of which is good law, but is not applicable here. The proceeding under the Braffet contest has been finally closed, and terminated, and as admitted by the appellant the appellee has exhausted the procedure of the Department, and can do nothing more there (R., p. 12).

It will require no argument to refute the claim that since the title to the land remains in the United States, suit may not lie against the appellant to compel him to perform his duty and to permit the appellee to complete his purchase.

It is true that if the proceeding had not been finally closed and was still alive in the Department, the courts

could not interfere except to compel appellant to proceed, etc.; but the cases are numerous and uniform that when the procedure of the Department is exhausted then the courts may review a decision of law that closed the proceeding to the prejudice of a qualified applicant and review the obstructions alleged made by appellant. Otherwise no mining locator, desert entryman, homesteader or other claimant under the laws of the United States could ever review by any judicial action an erroneous decision of law that deprived him of his statutory rights, and the decision of the Secretary-appellant would become final and conclusive on rulings of law as it is on findings of fact. No railroad grantee, no swamp land or school land claimant could ever review a decision of law that destroyed the various grants, and the scores of decisions of this Court utterly refute the illogical and erroneous contention of appellant in such regard. Here the appellant was not construing, and did not base his decision on a construction of, Section 2347, R. S., or of the school land grant or of a land law of the United States, but was construing and applying a *cancelled* rule of procedure that was not even applicable, in any event, to the subject-matter, and through that construction he *obstructed* the right of appellee to complete his purchase.

The grant to Utah was not a public land law that vested the construction of the same in the judgment and discretion of the appellant. It is like, in such regard, a swamp land act which the Court of Appeals of the District of Columbia in the case of O'Donnell *vs.*

Work (W. L. R., Vol. 54, p. 886) held was not a public land law and no discretion or judgment was vested in the appellant to administer except in ordinary routine, save in the single instance of passing on the mineral quality of the land; and the appellant did not seek review of that decision.

The *Rives case, 267 U. S., 175,* is not applicable here since there it was only held that where Congress had committed the administration of a statute to a Secretary, his erroneous construction of the same could not be reviewed by *mandamus,* since that writ could not operate as a writ of error, and the citations therein simply illustrate a well settled principle.

So it is with the citation by appellant of *Shepley vs. Cowan, 91 U. S., 330,* where it was simply held that until it was finally decided by the Secretary of the Interior that certain land was within or without the boundaries of a survey the courts could not interfere; all of which is conceded. But here the appellant had *finally* decided before the suit was filed.

IV.

Next appellant contends here, though the matter was not assigned as error in the courts below, citing Holt *vs.* Murphy, 207 U. S., 407-414, to the effect that no application to initiate a right under the laws of the United States will lie for a tract of land embraced in a *previous entry,* until the *entry* has been cancelled on the records of the local land office; and appellant seeks to apply that rule here by claiming that the presumptive title of Utah arising through the return of the

surveyor that the land was not mineral, was an *entry* on the records of the local land office that suspended the operation of Section 2347, R. S., until that entry was canceled on the records of the local land office; and hence the admitted acceptance of an application to purchase under Section 2347, R. S., was simply an application to contest the *entry* of the State; and if the contest was successful, no rights would accrue to the successful contestant! That is the flat position of the appellant based on his construction of a cancelled rule.

The legal meaning of the word "entry" is fully settled. It means an application to purchase public lands at private sale through the local land office under a public land law, with the sequence that when said application is accepted and entered on the records of the local land office it cannot subsequently be embraced in any other application to enter under any land law of the United States until the prior entry has been cancelled, but here the appellant seeks to dignify the unfounded claim of the State to *known coal lands* that were excepted from the operation of the grant by calling the unfounded, mythical and illegal claim an "entry" under the land laws of the United States. We submit the proposition is simply an anchor to the windward cast overboard in the wild hope that the anchor may drag in the kelp and save the drifting ship.

Such is the "forty year rule of practice" that appellant advances here, perfectly applicable in an instance where there is a previous uncancelled entry made under the land law of the United States on the local records

and where a subsequent applicant under the public land laws of the United States seeks to embrace in his application land embraced in a previous uncanceled entry. Then appellant, proceeding, claims that the application to purchase being merely an application to contest the *entry* of the State, no preference right would flow to the successful applicant because he was a coal applicant and not a preemptor, a homesteader or a timber culture applicant as defined by the Act of May 14, 1880, c. 89, sec. 2, 21 Stat., as amended by U. S. C. tit. 43, sec. 185. In *Stockley vs. United States* (*supra*), Mr. Justice Sutherland also discussed and defined the word "entry," citing *Chotard vs. Pope*, 12 Wheat., 586, 588, clearly showing the claim of Utah could not amount to an uncancelled entry in the records of the local land office.

It is admitted that no one contesting an entry made under a land law of the United States can secure a right of preference to enter in case of a successful contest in case of a homestead entry unless the contestant was a preemptor, a homesteader or a timber culture claimant; but the rule of the statute was limited to a contest of a previous uncancelled homestead entry. Appellant so admits in the *certiorari* application. (Brief, p. 19), but we were not seeking a preference right which is only allowable in an instance arising under sec. 2348 R. S.

Then, in sequence, appellant proceeds to argue that the application of Braffet was invalid, since the land was not "vacant" at the time the Braffet application became embraced in and covered by the uncancelled

entry of the State on the records of the local land office, and seeks to establish that the mythical entry of the State was the equivalent in law of a mining location, and cited the case of *Durnford vs. Fall, 285 Fed., 887* (D. C. Court of Appeals), where the court held that an application to purchase coal lands under Section 2347, R. S., would not lie where the lands were embraced in and covered by a previous uncancelled mining location. Various other similar cases are cited by appellant, but none of them even suggests that an unfounded claim constitutes an entry under the laws of the United States, and all of them are instances where a subsequent applicant sought entry and purchase of lands embraced in an uncancelled previous entry made in due form of law under any of the land laws of the United States; and until this Court holds that the mere return of the surveyor that the lands were not mineral constituted an entry on the records of the local land office under a land law of the United States, the appellant will be without authority to sustain his extraordinary contention.

The Court of Appeals Decision.

The court below held:

(1) Citing *United States vs. Sweet*, 245 U. S., 563, that no presumptive or any other sort of title passed to Utah under the grant to known mineral lands.

(2) That the rule of March 6, 1903, in any event, was not applicable, since the State, after being given

an opportunity to produce testimony to defeat the appellee, voluntarily withdrew from the contest, thus surrendering any rights it may have had thereunder as contestee. The Department has invariably so held in a score of cases that the withdrawal from a contest leaves the issue between the entryman and the United States. (See Appellee's Brief opposing *certiorari*, p. 23). Here the appellant claims he had the right to barter a lease of the lands in exchange for a conditional relinquishment of any claim of title by the coal lessee arising under the patent of the lands by Utah to the lessee.

(3) Next, the Court of Appeals held that where a citizen has submitted required proof of compliance with a public-land law and *his entry has been placed on record* (as here), he is vested with a presumptive title to the land, a title which precludes allowance of any other title so long as entry remains intact.

> "The title of the entryman is not absolute, however, but it is still subject to investigation and scrutiny; and if found for any reason to be invalid, it is liable to cancellation. But cancellation cannot emanate from thin air * * *. Thus it will be observed that by rule of practice established in the Department, and, indeed by the law as announced by the Court in many instances, the moment that Braffet's application for purchase was placed on record in the local land office, he acquired an interest that could not be divested in favor of any other claim so long as his entry remained intact."

This universal rule of the department and of the courts is not referred to by appellee. Individually he seeks to avoid it here by contending, despite the admissions he made by his accuser, that the application although accepted, was only a contest application, *i. e.*, was now accepted and could not be accepted by review of the cancelled regulation.

The court further held that the appellant, under Section 2 of the Leasing Act, which reads (and under which appellant executed the lease to the absent corporation).

> "That the Secretary is hereby authorized, in according leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants,"

had attempted to "barter" away the rights of Braffet under the said provision of the Leasing Act, which the Court of Appeals held was only applicable to contesting *applicants for a lease* in a lease proceeding where the application for a lease was contested by another leasing applicant. Here the appellant applied it to a coal lease applicant because that applicant was claiming under an *agricultural* patent for *known* coal lands! Still it was the basis of the barter, but the accuracy of the statement of the court below concerning the alleged basic proposition is not questioned. The Secretary-appellant was evidently of the impression that when application was made to lease coal land, etc., he could call in every claimant holding or

claiming under any public-land law and dispose of their claims and titles on the application of a person that sought to lease their respective holdings!

In fact, no portion of the opinion of the learned Court of Appeals is attacked by appellee, except the passing suggestion that the court refused or neglected to hold that under a *cancelled and defunct* regulation it was the duty of the Secretary to hold that the application to purchase was merely an application to be permitted to contest the mythical entry of the State.

The court below held squarely that the lease and the Leasing Act, like the flowers that bloom in the spring, have nothing to do with the case, and the appellant only contends in connection with his proposition that the Leasing Act wiped out the application of Braffet because it was not a vested right, while this Court held in the Stockly case that any claim which in due course would ripen into a vested right was within the exception of the Leasing Act, and the court below held the application of Braffet was such a claim and that he was entitled to perfect it.

The attempt of the appellant to bring this case within the citations made in the Rives case, beginning with United States *ex rel.* Ness *vs.* Fisher, cannot be sustained. Those cases simply held, regulation or no regulation, that an erroneous decision could not be reviewed by mandamus; and, even if we admit that the erroneous construction by the appellant of any statute committed in its administration to his judgment and discretion cannot be reviewed by the courts, still, the case is not here. If the Secretary had held that the

applicant was not a qualified citizen, or that the land was not coal land, etc., then his decision would be final. But here he denies the statutory right to purchase through the error of holding that a cancelled rule controlled his action.

We submit the rule is this, namely: That a decision of law arising on undisputed evidence is in no sense conclusive on the courts, but is subject to review, and any action of the department based on a misconstruction of the law can be corrected by the courts.

The decisions of this Court are so numerous sustaining the rule it would be trite to cite more than one or two. In Wisconsin Cent. R. R. *vs.* Forsythe, Mr. Justice Brewer (159 U. S., 46), said:

> "But further, it is urged that this question of title has been determined by the land department adversely to the claim of plaintiff. This is doubtless true, but it was so determined, not on any question of fact, but on the construction of the law; and such matters we have repeatedly held are not concluded by the decision of the land department." (Citing numerous cases.)

The defendant admitted in his answer that in July, 1903, the General Land Office classified the land as coal land (ans. R., 6) which classification was in force at the time the appellee made his application to purchase. We submit that such classification was a *prima facie* determination that the land was open to purchase under Section 2347 R. S., and warranted the application to purchase, and in that connection it must be noted that the appellant did not allege in his an-

swer or claim in the courts below that the return of the surveyor was true or entered on the records of the local land office, or that such uncancelled entry appeared on the records of the local land office at the time of Braffet's application.

The only allegation in the answer (R., p. 11) is that the land had been surveyed and returned as non-mineral, but the appellant did not intend the return was true and, as first held it was not true.

Time and time again it has been held by the Department of the Interior and by the courts that a return of a surveyor that land is mineral or non-mineral is merely a notation in the field notes of a survey that has no binding effect. The Department never held, nor did any court ever hold, that a mineral return by a surveyor precluded a subsequent agricultural entry under the laws relating to pre-emption, homesteads, etc.; and neither the Department nor any court ever held that a non-mineral return by a surveyor precluded an entry under the mining law; and no court (nor the Department) ever held that a return by a surveyor that the land was mineral or non-mineral, was an entry in the local land office, and differentiation may not arise because the land returned was a section of land embraced in a school land grant.

Our brief opposing *certiorari* contains the authorities bearing on the subject of appropriation of known mineral school sections, and they are overwhelmingly that a mineralized school section is open to appropriation under the mining laws, although the land had been returned as non-mineral by the surveyor;

but, the appellant necessarily must contend otherwise, or his argument goes over the rail, since if the insignificant return was not an entry by Utah (or its legal equivalent in suspending the operation of the coal laws) then his last contention is forever gone. Perhaps that contention is the base of his argument that it has been a rule of practice for 40 years!

Outside of authority and citations it is very clear that such mere return could not be an entry (or its legal equivalent) since entries can only be made by citizens under a public-land law of the United States.

Under no law could Utah make an entry in the local land office.

The school land grant to Utah required no administration in the general or local land offices.

Here the grant passed all designated sections to the State on the date of a survey showing the section was non-mineral *unless* it was an excepted known coal-land section. If it was known coal land at the date of the grant, it could not pass to Utah even if the surveyor returned it as non-mineral. Land known to be coal land could not pass under the grant. If the surveyor's return created the presumption that the land was not within the exception of the grant, it is clear the presumption could not suspend the operation of the coal-land laws if, in fact, the land was known coal land. On this appellant pegs his point, that an entry or an application to purchase known coal lands could not be made until he determines that they were known coal lands, and that he only makes such a determination in an ap-

plication to contest the agricultural entry of the State, and although he upheld the contestant, still that person could have no right of preference, since under the homestead act of May 14, 1880, such preference rights accrued only to pre-emptors, homesteaders and timber-culture entrymen, and since Braffet was neither, no rights flowed to him.

Such contention necessarily leads him to follow his false premise that he could not determine the validity of the *claim* of Utah, the entry of Utah, until some competent person entered a contest against the entry of the State under *the said nonapplicable act of May* 14, 1880, and that therefore the application that Braffet made under Section 2347, R. S., to purchase known coal land (and which the appellant admitted in his answer, was known coal land) would be treated as a contest under the act of May 14, 1880, and would further be denied any rights by reason of the defunct regulation, and that by reason of "equitable consideration" he immediately leased the land to a participating contestant of Braffet's rights, *on the ground that it was known coal land prior to the time the grant attached.* No wonder the court of appeals spoke harshly of the Secretary of the Interior.

The foregoing views are augmented and enhanced by the unqualified admissions the appellant makes in his answer. Nowhere therein does he deny the positive allegations set forth specifically in the bill of complaint that Braffet duly applied "to purchase the following-described known coal lands, and known as such on the date of admission of the State of Utah, etc.

(R., p. 2, par. 3 of bill). In his answer (R., p. 11, par. 11) he alleges that whether or not Section 32 was excepted from the grant depends entirely whether the land was known as coal land when the grant became effective, but whether the land as a fact was known to be mineral at the time the grant attached *was an immaterial issue,* by reason of the fact that it had been identified by public survey and had been returned as non-mineral, and that then and there, *prima facie,* a good title vested in the State and was not appropriable public land, unless and until, on proceedings duly had, in a contest proceeding under the Act of May 14, 1880, to which Utah and her privies were parties, it was found and determined by the Land Department that the land was known mineral land on the date the grant attached, and until such decision the land was "not vacant" coal land not otherwise appropriated or reserved, nor could anyone acquire a vested right by any entry or application to enter under public-land laws, which is only an additional claim that the return of the surveyor was an entry by Utah under a public-land law which precluded the operation of the coal-land law until the Utah entry was canceled on the records of the local land office. The coal land sale act became effective March 3, 1873, and related exclusively to the sale of *coal* lands. The Act of May 14, 1880, was confined exclusively to preempture homestead and timber culture entries and limited the contestant there to persons qualified to make such entries and thereby to secure the right of perpetual entries. It is simply absurd to claim that the second act was or is applicable

to a person seeking to make a coal entry under Section 2347 R. S.!

That such a proceeding followed the application of Braffet is the conceded fact; but the legal result of the proceeding was utterly destroyed by the legal error of appellant in holding that, although Braffet had established his case, his application was simply an application to contest the entry of Utah, but since the homestead law of May 14, 1880 (*supra*), limited the right of contest of antecedent homestead entries to pre-emptors, homesteaders and timber-culture entrymen, no preference right to Braffet arose, the only result being to destroy the presumptive title of Utah and her privies; and since Braffet had no vested right, the land reverted to the public domain and subject to disposition under the Leasing Act; and thereon the learned Secretary of the Interior leased the land to the agricultural contestant, the Pleasant Valley Coal Company, on the ground that the land was *known coal land* at the time of the grant to the State! Comment is unnecessary. And the further fact is set forth in the answer that before the contest proceeding in the Land Department had terminated, the agricultural claimant applied for a lease on the ground that the land was known coal land at the time of the grant, and offering to "barter" its invalid and nugatory claim as patentee of Utah in exchange for a lease of Section 32!

The only reference to an application to a cash entry under Section 2347, R. S., in the coal land regulations (*infra*) is that it shall be subject to a valid adverse right; and up to this time the appellant has not con-

tended that the claim or assertion of Utah was a *valid adverse right,* but was simply an undetermined claim of a right.

Rule 1 of practice of the Land Department is the only regulation relating to contests; and it provides only

> "contests may be initiated by an adverse party or other person against a party to an entry, filing or other claim under laws of Congress relating to the public lands."

It is obvious that the regulation did not relate, as claimed by the appellant in the Court of Appeals, to an application to purchase coal lands under Section 2347, R. S., and such view becomes established when we examine the Act of March 3, 1909 (35 Stat., 844), which provides that an agricultural claim, like that of Utah and its alleged lessee, who has in good faith located, selected or entered under *the nonmineral laws* of the United States any lands which subsequently are classified, claimed or reported as being valuable for coal, may receive a patent therefor, reserving the coal deposits to the United States.

Subsequent to this Act, Section 32 was classified as coal; and neither Utah nor its privies protested the application, and subsequent to the classification Braffet made his application.

It may be claimed that the classification being after the grant it was only a "subsequent discovery," which did not disturb the grant to the State; but the fact should be remembered that appellant, in his answer,

admitted the lands were known coal lands on admission day, and further admitted had been classified by the Department of the Interior as coal lands prior to Braffet's application.

The attempt of the appellant to bring within Rule 1 of Practice the application of Braffet is based on the canceled paragraph of the rule of March 6, 1903, which said:

> "Applications presented under the mining laws covering parts of a school section *will be disposed of in the same manner as other contest cases,*"

and, *ergo,* the general rules of practice controlled; and since those rules gave no rights to a successful contestant unless he was a pre-emptor, homesteader or timber-entry claimant contesting an agricultural entry, Braffet therefore gained nothing by his contest. Assuming, for the moment, the paragraph so provided, what became of it when later, and before the Braffet application, this paragraph was substituted in its stead, namely:

> "Claims of parties based upon mineral *locations* covering parts of a school section, asserting that the same were known to be chiefly valuable for their mineral deposits at and prior to the time when the right of the State would have attached thereto, if at all, will be disposed of when applications for patents under the *mining law* are presented."

While even this amendment did not relate to Braffet's application any more than did the canceled para-

graph, it clearly shows the absurdity of the claim that the canceled paragraph controlled the situation.

Concerning the Canceled Regulation.

We submit, that in any event, if the regulation relied on by the Appellant was in operation, as he claims in his answer, on the date of Braffet's application, it was nugatory and void, as it suspended the operation of Section 2347 R. S.

It is finally settled that a regulation of the land department must be appropriate and such regulations must be reasonable and lead toward the enforcement of the statute; and the land department is not authorized to adopt rules and regulations which are destructive of rights conferred by Congress or to annex conditions or provisions to the law. Williamson *vs.* United States, 207 U. S., 425.

It will be noted here that the application of Braffet was made under Section 2347 R. S., and that the authority of the land office to make rules and regulations is defined by Section 2351 R. S., and pursuant to such direction, and on April 12, 1907 (35 L. D., 665), the land department adopted the following regulation:

> "Sec. 22. An application for cash entry (as here) will be subject to any valid adverse right which may have attached to the same land pursuant to Section 2348 R. S."

It is clear that *no* regulations of the land department referred to applications made under *Section 2347 R. S.*

Section 2348 R. S. only refers to persons who had settled on or had made improvements on or had *discovered* coal on the land and to such persons a preference right of entry under *Section 2347 R. S.* was given.

Section 25 provides that the rules of practice of the general Land Office will, as far as applicable, govern all cases and proceedings providing for the sale of coal lands.

These duly promulgated regulations were made subsequent to the canceled regulation, which, as we have seen, related solely *to indemnity selections by the State.*

The practice in an instance to enter a claimed mineral school section was passed on by Secretary Hitchcock in Dakota *vs.* Walsh, 34 L. D., 723, where he held that a mining entry could not be allowed on such a section unless the State had had an opportunity to contest the application, and in a proceeding following it was for the applicant to establish (and not the State) the quality of the land at the time the grant attached; and Braffet did so in his proceeding.

Lindley on Mines (3d ed., sec. 679), commenting on the above case and its citations, holds that when the mineral applicant has established the mineral quality of the land at the time the grant attached, and in the face of a non-mineral return by the surveyor (and the State has had notice), the force of the surveyor's return is destroyed, the government will deal with the land the same as any other public mineral land.

Another point we strongly urge is that the Secretary did not have the right to make and promulgate the

canceled rule under either Section 2347 R. S., or under the school land grant to Utah, and therefore it is nugatory.

Its history clearly and conclusively shows, as well as its preamble, or enacting clause, that it was designed to carry into effect the Act of February 28, 1891 (26 Stat., 786, as amended by Act of May 3, 1902; 32 Stat., 188), both being indemnity acts and made applicable to Utah by the latter act. The last paragraph of the regulations of March 6, 1903 (32 L. D., 44), reads as follows:

> "These instructions are in lieu of and to take the place of the regulations on this subject of May 27, 1891 (24 L. D., 548), in so far as those regulations deal with the question of mineral lands involved in school indemnity selections; and all previous regulations in conflict herewith are hereby set aside."

Turning to 24 L. D., 548, we find that the regulations related solely to selections of land in the states of Montana, North Dakota, South Dakota and Washington under grants to said states, which act has been extended to the State of Utah.

The further point is that neither the regulations of May 27, 1921, March 6, 1903, or January 10, 1906, or the above acts were applicable to an application to purchase lands under Section 2347 R. S., but were in each instance applicable only to an instance where the State attempted to make an indemnity selection tendering a mineralized school section as the base for the indemnity selection; and, further, the Secretary had not the

legal right to apply such a rule to the coal land law which did not authorize such regulations.

Conclusion.

Finally, we urge that no interest of the United States or of the alleged lessee will be adversely affected by affirmance here. At best the alleged lease has only a basis growing out of a public land law, the mineral leasing act, and its right thereunder, if any, is to be determined by the courts of the land of the venue.

This proposition was distinctly laid down in *Shulthis vs. McDougall*, 225 U. S., 561, where is was stated:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws; for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law upon the determination of which the result depends. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. * * *"

As was said in *Blackburn vs. Portland Gold Mining Co.*, 176 U. S., 571,

> "A controversy in respect to lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an Act of Congress."

Here Braffet is asserting his right under Section 2347 R. S., and the appellant is denying that right, not under any law of the United States, but under a construction of a nonapplicable cancelled regulation of his department; and surely, we urge, the *certiorari* procedure was not designed for such an instance.

If it be contended that both parties are claiming under different laws of the United States, the first answer is that only one of the parties is before the court, and the second answer is *Norton vs. Whiteside*, 239 U. S., 154. There both parties claimed under laws of the United States, and this Court held that fact in no way changed the situation or affected the rule laid down in *Blackburn vs. Gold Mining Co.* (*supra*) and in the other cases cited in the decision. And it must be noted that the decree of the trial court (R., p. 14) expressly stated, "No right of said Pleasant Valley Coal Company shall be affected by this decree."

Chief Justice Marshall in *Cohen vs. Virginia*, 6 Wheat., 379, said:

> "(a case) may truly be said to arise under the construction of a law of the United States whenever its correct decision depends on the construction of either,"

or (*Osborn vs. Bank*, 9 Wheat., 822) when the title or right set up by the party may be defeated by one construction of the constitution, or sustained by the opposite construction of the Constitution or law of the United States.

What is there properly before the Court?

First, only the construction of a cancelled, nonapplicable regulation on which the entire defense is based; second, the nature of the remedy, possibly.

We say possibly, because on taking his appeal to the learned court below, appellant did not designate the subject as error (R., p. 15), and nowhere in the answer was there reference to the subject.

Concerning the subject of mandatory injunction, the appellant only said (R., p. 15) in his assignments of error, that the court erred in holding that a mandatory injunction should issue directing appellant to vacate his decision of July 31, 1922, and to affirm in all respects the former decision of the Commissioner of the General Land Office, and requiring him to declare Braffet's petition to be valid, etc., and the court below modified the decree accordingly.

The appellee suggests that since the court below reversed the decree of the trial court and remanded the same to the court below for the entry of a new decree that the application for certiorari was premature and that the proper practice required the case to be remanded and a decree entered in accordance with the decision of the court below, and then if dissatisfied, the appellant could pursue his appeal from that point, if such remedy existed.

We respectfully submit the decree of the court below should be affirmed.

WALTER EDMUND BURKE,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1927.

Hubert Work, as Secretary of the Interior, Petitioner, *vs.* Robert L. Braffet, Administrator of the Estate of Mark P. Braffet, Deceased.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[April 9, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent's intestate brought suit in the Supreme Court of the District of Columbia for a mandatory injunction compelling the Secretary of the Interior to vacate his decision rejecting an application under R. S. § 2347 for the purchase of certain coal lands included in the school-land grant to Utah, and directing that a patent issue. The case was heard on bill and answer from which it appears that the land in question, is part of section 32 in a particular township in Utah. Section 32 of each township was included in the school-land grant to the state of Utah under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107, 109, which became effective on the admission of Utah into the Union January 4, 1896. But the grant did not include any land that was known to be mineral. *United States* v. *Sweet*, 245 U. S. 563. In the official government survey the land in question was reported by the surveyor as non-mineral. In May, 1902, the state sold the lands and the purchaser later conveyed them to the Pleasant Valley Coal Company which has since appeared as the record owner and paid taxes on them. On February 4, 1918, Braffet, respondent's intestate, filed in the local land office at Salt Lake City his application to purchase the lands as coal lands. At this time and for many years before, the settled practice of the Land Office, under Rule 1 of the Regulations of March 6, 1903, 32 L. D. 39, had been to treat applications for purchase, under the mining laws, of parts

of a section designated in the school-land grant, where made after the date when the grant would attach if the land was non-mineral, as a contest of the state's right.

Braffet's application was so treated. The state was cited and answered, protesting the application and setting up that the lands were not known coal lands on the date of the grant to it. The coal company intervened and made like answer. Braffet assumed the burden of the contest and offered evidence. At the conclusion of his case motions of the state and the coal company to dismiss were granted without the submission of testimony in their behalf. Braffet appealed to the Commissioner of the General Land Office, who reversed the action of the local land office and without affording the state or the coal company opportunity to offer evidence, directed that Braffet's contest be sustained the protest of the state dismissed. The state and the coal company appealed to the Secretary who, July 31, 1922, held that the local office had erred in dismissing the contest for insufficiency of evidence, and that the Commissioner had also erred in disposing of the case without affording the state and the coal company an opportunity to offer evidence. He remanded the cause to the local office to proceed with the contest. 49 L. D. 212.

In the meantime the Leasing Act of February 25, 1920, c. 85, 41 Stat. 437, 438, 451, had been enacted, authorizing the disposition of mineral lands of the United States by the Secretary of the Interior only by lease. Acting under this statute the Secretary, on June 4, 1923, executed a lease of the land to the coal company which, in contemplation of this action, had waived its claim under the state grant, expressly stipulating that its waiver was on condition that the lease be granted. The state in the meantime had withdrawn its protest to Braffet's application, without prejudice to the claim of the company, setting up that it had no beneficial interest in the land by reason of its own conveyance to the coal company's grantor.

Braffet's contest was dismissed January 8, 1924, and his application to reopen it was denied on March 24, 1924. Later, the present suit was brought. The decree of the Supreme Court of the District, directed the Secretary to vacate his decision remanding the proceedings to the local office, and to issue a patent on payment of the purchase price. The court of appeals modified the judgment in respects not now material, but held that Braffet's

application was valid and that the Secretary should be directed to issue a patent. — App. D. C. —.

The principal question presented is whether, by the application to purchase and by bringing and conducting the contest, Braffet acquired rights which could not be or were not extinguished by the action taken under the Leasing Act. In giving an affirmative answer the court of appeals thought that as the Secretary had ruled that Braffet had made a prima facie case before the Department, the abandonment by the state and the coal company of the protest and their assent that the mineral lease be given were equivalent to the allowance of his claim, and that the Secretary under the Leasing Act was without power to defeat the claim since it had then ripened into a vested right.

After the Leasing Act, mineral lands of the United States were subject to disposition by the Secretary only by lease "except [under § 37] as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Braffet's application was for the purchase of mineral lands and not for a lease. It was not entitled to consideration under the Leasing Act unless saved by the exception as a "valid claim" existent at the date of the Act.

R. S. § 2347, under which the application was made gives the "right to enter . . . vacant coal lands of the United States not otherwise appropriated or reserved by competent authority." The departmental Regulations of March 6, 1903, 32 L. D. 39, withdrew school lands from entry with direction to local officers to treat applications for them in the same manner as contests. Rule 1 reads:

"When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public-land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases."

This rule has never been expressly repealed. The Department has consistently held that it is applicable to school lands, *Charles L. Ostenfeldt*, 41 L. D. 265; *Santa Fe Pac. R. R.* v. *California*, 34 L. D. 12, and that applications for tracts embraced in an entry

of record give rise to no rights until the entry has been cancelled of record, *Walker* v. *Snider,* 19 L. D. 467; *Stewart* v. *Peterson,* 28 L. D. 515, 519; *Hiram M. Hamilton,* 38 L. D. 597.

The rule is an appropriate application to school-land grants of the established policy of the Department to treat as excluded from entry or preemption lands which may, in the execution of the laws of Congress, fall within the claims of others, a policy which avoids confusion and conflicting claims. *Shepley* v. *Cowan,* 91 U. S. 330; *Holt* v. *Murphy,* 207 U. S. 407, 414.

Under both R. S. § 2347, conferring the right to purchase only "vacant coal lands of the United States not otherwise appropriated or reserved by competent authority," and Rule 1, *supra,* as interpreted and applied by the Department, we think that Braffet, by his application, acquired no legal status other than that of a contestant, and that this amounted to no more than a privilege of seeking to restore the lands to entry. The pending contest presented no obstacle to the withdrawal of the privilege by the United States. Compare *Shepley* v. *Cowan, supra; Frisbie* v. *Whitney,* 9 Wall. 187; *The Yosemite Valley Case,* 15 Wall. 77; *Campbell* v. *Wade,* 132 U. S. 34, 37; *United States* v. *Norton,* 19 F. (2d) 836; *Alice M. Reason,* 36 L. D. 279, 280-1; *Instructions,* 40 L. D. 415, 416, 417. Plainly it was withdrawn by the provisions of the Leasing Act, already quoted, unless saved by the exception "in favor of valid claims existent at the date of passage". Even if so saved the land would have been restored to entry only if the contest were determined in respondent's favor, which was not done.

But we think that the exception in § 37 was not intended to save so nebulous and insubstantial a claim as that of the privilege of contesting the presumptive title of the state. The construction argued for would tend to defeat the purpose of the Leasing Act which was to prevent the sale of the mineral lands of the United States where substantial rights had not been acquired in them, and to permit their exploitation only by lessees paying royalties to the Government. The reference in § 37 to valid claims "thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery" at least suggests that they embrace only such substantial claims as would on compliance with the provisions of the former law ripen into ownership; such claims as might be acquired under

the mining laws by location, possession and development which, if continued to discovery and entry, would entitle the claimant to a patent. That such was the purpose is established by the Congressional debates. 58 Cong. Rec. pt. 5, pp. 4577-4585. 66th Cong. 1st Sess.

Here the claim of the contestant was not one which would necessarily ever come to fruition in ownership for, if successful, he would not have been entitled to entry or patent in preference to any other citizen desiring to apply for the land. In the absence of a statute or a departmental regulation securing it, there is no preference right. Compare *Hartman* v. *Warren*, 76 Fed. 157; *Howell* v. *Sappington*, 165 Fed. 944; *Charles L. Ostenfeldt*, 41 L. D. 265, 267. As the provisions of the Leasing Act precluded the contestant, if successful, from purchasing the lands in question as coal lands, his contest was rightly dismissed, and it becomes unnecessary to consider the effect upon the proceedings in the Department of the withdrawal of the state's protest.

Whether if the situation were otherwise the Secretary could by a mandatory injunction be directed to issue a patent, we need not consider. No decision of this Court up to this time has given sanction to such a direction.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.